COMPLAINTS AND COMPLIANCE COMMITTEE[3]

Date of Hearing: 5 March 2016 **Case Number: 130/2016**

SOUTH AFRICAN POST OFFICE SOC LTD **Complainant**

ARAMEX South Africa (PTY) LTD **First respondent**

POSTNET SOUTHERN AFRICA (PTY) LTD **Second respondent**

DHL INTERNATIONAL (PTY) LTD **Third respondent**

COMMITTEE: **Prof JCW Van Rooyen SC**
Councillor N Batyi
Ms Nomfundo Maseti
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Mapato Ramokgopa

For the Complainant: Attorney Mashudu Thenga from Madhlopa Inc.
For the Respondent: Alfred Cockrell SC instructed by Baker & McKenzie .

JUDGMENT

JCW VAN ROOYEN

[1] In April 2015, the Office of the Coordinator of the Complaints and

[3] An Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000.The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance divisions or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. In such a case the judgment on the merits is referred to Council for noting. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator and published on the ICASA website. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

Compliance Committee ("CCC") at the Independent Communications Authority of South Africa ("ICASA") received a complaint from the South African Post Office Society Ltd ("SAPO"), signed by Dr Sima Lushaba, at the time the Administrator of the South African Post Office and Mr Mlu Mathonsi, the Acting CEO. The Complaint was directed at the Chairperson of the Complaints and Compliance Committee, who was mentioned by name.[4]

[2] To understand the complaint within its context, it is necessary to quote the full letter from SAPO to the CCC Chair. It will be noted that the complaint is firstly directed at companies which, in the ordinary course, are involved in the delivery of articles, including mail, which do not fall within the postal category reserved for SAPO. The letter then lists 30 Municipalities which, according to the Complainant, are or were involved in the delivery of post which is reserved by legislation to be delivered only by SAPO. We will only deal with the complaint against the companies in this judgment, since this part of the complaint was separated procedurally by the Chairperson, in terms of section 17(6) of the ICASA Act, from the complaint against the Municipalities mentioned in the letter.

THE COMPLAINT

[3] The letter, dated 14 April 2014, reads as follows:

COMPLAINTS IN TERMS OF SECTION 17C OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA ACT (ACT NO 13 OF 2000) AS AMENDED

Background

One of the four objectives of the Independent Communications Authority of South Africa Act (Act no. 13 of 2000 as amended) ("the Act"), is to "regulate postal matters in the *public interest* in terms of the Postal Services Act..." (SAPO emphasis).

Section 15 paragraph (1) of the Postal Services Act (Act no. 124 of 1998) states that "*... no person may operate a reserved postal service except under and in accordance with a license issued to that person...*" (SAPO emphasis).

Schedule 1 of the Postal Services Act lists three reserved postal services, i.e. letters and parcels that adhere to certain weight and size criteria; issuing of postage stamps; and the provision of roadside collection and address boxes. ICASA

[4] Prof van Rooyen.

General Notice, 156 of 2011 defines post office box rentals as the "rental of a physical box by the general public members or businesses."

In 2014, the cost of SAPO's universal services obligations ("the USO") was R1.169 billion and is expected to have increased to R1.760 billion by March 2015. The estimated profit from reserved postal services was R463 million in 2014 and is expected to be only R14 million by March 2015. SAPO is therefore providing the USO to the public at a loss. Section 15 paragraph (2) of the Postal Services Act states that "a license confers on the holder the privileges and subjects him or her to the obligations..." If SAPO were to continue providing universal services, it needs to maximise profits from reserved postal services. The Strategic Turnaround Plan ("the STP") addresses, among others, the inefficiencies in the SAPO operating model and should lead to improved profits from reserved postal services. The STP also identifies revenue opportunities but it cannot address encroachment on SAPO's reserved postal services, specifically letters and parcels; and post boxes. SAPO estimates that the loss of revenue due to encroachment is at least R1.5 billion per annum, a figure which raised attention during a briefing session with the Honourable Deputy President on 13 March, 2015.

In terms of Section 17B of the Act, the Complaints and Compliance Committee ("the CCC") of ICASA "must investigate...and make a finding on...complaints received by it...and allegations of non-compliance with... [The Act]... and may make any recommendation to... [ICASA]..."

Section 17C, paragraph (1) (a) of the Act allows "a *person* who has reason to believe that a licensee or *another person* is guilty of any non-compliance with... [the Act], may lodge a complaint with...ICASA..." (SAPO emphasis).

Furthermore, paragraph (1) (b) of the same section states that ICASA "...may, where the complaint regards a person who is not a licensee, lay a charge against that person with the appropriate authority or institution... within 30 days of the receipt of the complaint; or investigate the complaint..."

Section 17G of the Act describes the far reaching powers of ICASA inspectors and the CCC's right to request documents or evidence from these inspectors.

Section 17H of the Act lays out a number of offences and punitive measures that may be taken by the CCC where a person is guilty of an offence.[5] Past interactions with ICASA regarding encroachment.

In March 2008, SAPO first lodged a complaint with ICASA concerning municipalities who are mailing in contravention of the reserved postal services. To date, this matter has not been resolved to the satisfaction of SAPO.

In a letter dated 12 December 2012, SAPO requests ICASA to investigate complaints that have been raised in the past against two private companies, Post Net and 3@1, who have been providing reserved postal services without being licensed. To date, this matter has not been resolved to the satisfaction of SAPO.

[5] This is not correct: Once a sanction is imposed by Council, the omission to give effect to that sanction is a criminal offence in terms of section 17H of the ICASA Act – and that is as far as it goes. Section 17H, however, creates a number of other offences. The CCC's decisions as such are, however, not protected by section 17H of the ICASA Act. The CCC has no powers to enforce its decisions. It may, however call upon an inspector to appear before it and answer questions in terms of section 17F(5)(f) of the ICASA Act. Inspectors are, however, only tasked by the Council of ICASA – see section 17F(5).

In both cases it would appear that ICASA and/or the CCC did not apply the process envisaged in Chapter III of the Act, opting rather to arrange meetings between SAPO and the alleged transgressors in what seems to be an attempt at mediation. SAPO has taken a clear and principled stand that any encroachment onto the reserved postal services should be dealt with decisively by ICASA and is not a matter for mediation or negotiation.

Complaint

SAPO wishes to lodge the following complaints in terms of Section 17C of the Act:

Aramex/Pick 'n Pay/Fresh Stop

Aramex, a large multi-national courier company and a non-licensee, provides the following reserved postal services in association with Pick 'n Pay and Fresh Stop:

- Letters and parcels of less than and including one kilogramme
- Letters and parcels of dimension smaller than 458mm X 324mm X 1OOmm

PostNetlAramex/DHL

PostNet, a subsidiary of Aramex and a non-licensee, provides the following reserved postal services in association with DHL:

- Post boxes
- Letters and parcels of less than and including one kilogramme
- Letters and parcels of dimension smaller than 458mm X 324mm X 1OOmm

3@1/Aramex/DHL

3@1, a non-licensee, provides the following reserved postal services in association with

DHL and Aramex:

- Post boxes
- Letters and parcels of less than and including one kilogramme
- Letters and parcels of dimension smaller than 458mm X 324mm X 1OOmm

Municipalities

The thirty municipalities listed at the end of this letter, all of whom are not licensed, are providing reserved postal services in the form of letters of less than and including one kilogramme.[6]

Conclusion

[6] For purposes of the present matter it is not necessary to include the list of Municipalities.

SAPO requests that these complaints receive urgent attention because it is in the public interest that SAPO is financially sustainable. SAPO urges ICASA and the CCC to reach the obviously correct conclusions and to issue orders for the transgressions to desist from any further contravention; to fine the transgressors retrospectively as contemplated in Section 17H(h)(ii);[7] and to order them to take any remedial action that may be necessary."

[4] On 3 July 2015, the CCC Coordinator addressed a letter to the respondents. The letter stated that the SAPO Complaint "is referred to the CCC in terms of s 17C of the [ICASA Act]". The letter reproduced the terms of the SAPO Complaint. The Coordinator called upon the respondents to answer the allegations in the SAPO Complaint within 15 days, as required by Regulation 4(1) of the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee.

ANSWER BY THE RESPONDENTS

[5] On 7 August 2015, the Respondents replied to the SAPO complaint. The letter stated that the Complaint was inadequate for purposes of enabling the respondents to prepare an answer. The letter drew attention to particularity that was missing in relation to each aspect of the complaint. The letter also requested ICASA or SAPO to furnish adequate particularity in order to enable the respondents to furnish the responses envisaged by section 17C(2)(b) of the ICASA Act.

[6] On 11 August 2015, the Chairperson of the CCC addressed a letter to the Respondents. The letter stated that "the CCC cannot, of course, reformulate the complaint and fill in the alleged gaps" – the request for further particulars therefore had to be addressed by SAPO.

REPLY BY SAPO

[7] SAPO reacted on 9 October 2015. It declined to furnish any particularity whatsoever. SAPO explained its position as follows:

> "2. *Kindly note that the South African Post Office (SAPO) did not lodge the complaint with the intention to initiate litigation, but rather to alert CCC of SAPO's concerns in regarding to the suspected conduct of the alleged entities in terms of section*

[7] This is not correct. Section 17H of the ICASA Act creates offences which resort under the jurisdiction of the Criminal Courts and not ICASA. Once the ICASA Council imposes a sanction, the omission to give effect to that sanction is an offence, which may be prosecuted in the Criminal Courts – Chairperson of the CCC.

17(C)(1)(a) of the Independent Communications Authority of South Africa Act 13 of 2000 as amended (the ICASA Act).

3. *SAPO's specific intention with the lodgement of the complaint was to prompt an investigation by the CCC into allegations made in the complaint.*

4 ....

5. *The information currently available to SAPO is contained in the original submission to the CCC, inclusive of the existence of post boxes at the outlets of the parties identified therein, and the list of municipalities whose mail is not delivered by SAPO while it falls in the restricted weight and dimension category. If additional information is required, SAPO does not have such information and thus would not be able to exchange pleadings prior to such investigation taking place.*

6. *In the event that the CCC is not in a positon to conduct an investigation, then the matter should be put in abeyance pending the outcome of an investigation that SAPO itself will have to conduct".*

[8] The respondents replied to SAPO's letter on 28 October 2015. They pointed out that SAPO's response to the request for further particulars was inadequate and requested the CCC "to dismiss the SAPO complaint on the papers which are before it and without the necessity of a hearing".

THE PRELIMINARY APPLICATION TO DISMISS THE COMPLAINT

[9] On 29 October 2015, the CCC Chairperson in terms of section 17(6) of the ICASA Act addressed two similarly-worded letters to SAPO and the respondents respectively. The letters stated that the Chair would set down "an *in limine* application by [Aramex, PostNet and DHL] for the complaint to be dismissed." The letters made it plain that argument on the *in limine* application would be based exclusively on the SAPO Complaint and the correspondence summarised above.

[10] Four days before the hearing, SAPO filed an affidavit in which it contended that the hearing was "premature". SAPO stated that "the hearing of the matter, prior to any investigation having been conducted, will serve no purpose". SAPO asked "that this matter be put in abeyance pending the outcome of an investigation as envisaged in section 4(3)(n) of the ICASA Act".

[11] The affidavit adds nothing to the stance that had been articulated by SAPO in its letter of 9 October 2016. In response to that letter, the Chairperson of the CCC had set down the matter for argument on the *in limine* issue as to whether the SAPO complaint should be dismissed on the papers. All that SAPO's affidavit did was to ask the CCC to find that the SAPO complaint should not be dismissed on the papers.

[12] The issue for determination is whether the SAPO complaint should be dismissed on the papers currently before the CCC. Those papers comprise the SAPO complaint and the correspondence referred to. The respondents submitted that the SAPO complaint should be dismissed for the following reasons:

It is not clear whether SAPO envisages that ICASA or the CCC will investigate the Complaint. SAPO's affidavit approached the matter from two ends: on some occasions it states that ICASA is expected to conduct an investigation, while on other occasions it states that the CCC is expected to conduct an investigation.

It would not be competent for ICASA to investigate the SAPO Complaint, since ICASA has already referred it to the CCC.[8]

It would not be competent or procedurally fair for the CCC to investigate the SAPO Complaint in circumstances where the CCC has already accepted that the Complaint is lacking in adequate particularity and SAPO has declined to furnish any further particularity.

In the result, the only remedy is to dismiss the SAPO Complaint on the papers before the CCC.

[13] Mr *Cockrell*, who represented the respondents, indicated that he would first summarise the legislative framework and then elaborate on the

[8] However, see paragraph [13].

above submissions. We will not repeat that since it would seem that the respondents were under the impression that the present complaint was first filed with ICASA. It is true that SAPO referred in its letter to earlier attempts by the relevant division at ICASA to address the matter by attempting to broker a settlement. However, there is no doubt that the *present* complaint was directly lodged with the CCC in terms of section 17B(a)(ii) of the ICASA Act.

[14] Once a complaint is lodged with the CCC, the Coordinator, in terms of the relevant 2010 Regulations must grant the respondent an opportunity to file an answer with the Coordinator. A Reply by the complainant is also provided for.

[15] The SAPO complaint, inter alia, states as follows:

"SAPO requests that these complaints receive urgent attention because it is in the public interest that SAPO is financially sustainable. SAPO urges ICASA and the CCC to reach the obviously correct conclusions and to issue orders for the transgressors to desist from any further contravention; to fine the transgressors retrospectively as contemplated in Section 17H(h)(ii); and to order them to take any remedial action that may be necessary."

[16] SAPO's letter of 9 October 2015 states that the purpose of the SAPO complaint is "to prompt an investigation by the CCC into allegations made in the complaint", and goes on to state that "the CCC is empowered to do so in terms of section 17C(1)(b)(iii) of the ICASA Act". Section 17C(1)(b)(iii), however, provides that ICASA – not the CCC – may investigate a complaint. To the extent that SAPO's letter may be said to invite ICASA to investigate the SAPO complaint in terms of section 17C(1)(b)(iii), that course of conduct was not open to ICASA since the complaint was filed directly with the CCC.

[17] This leaves the CCC with the duty to investigate the complaint. It is true that the CCC is endowed with the duty to investigate a complaint in terms of section 17B(a) of the ICASA Act. The subsection provides as follows:

The Complaints and Compliance Committee –

(a) must investigate, and hear if appropriate, and make a finding on –

(i) all matters referred to it by the Authority;

(ii) complaints received by it; and

(iii) allegations of non-compliance with this Act or the underlying statutes received by it;...

[18] In dealing with the investigative function which had been granted to the Broadcasting Monitoring and Complaints Committee (which fell away in July 2006 as a result of amendments to the existing legislation) and the Complaints and Compliance Committee, which was in future to be the relevant tribunal, with a wider jurisdiction than the BMCC, Mpati AJ stated the following on behalf of the Constitutional Court in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC):

"[48] I agree with counsel for the respondents that the inquisitorial role is an inherent aspect of the regulatory authority, which in this case the BMCC represented. Licensees in the broadcasting industry are part of a regulatory realm which requires that they abide by their concomitant responsibilities. They accept as a condition of their licences 'that they will adhere to the same reasonable controls as are applicable to their competitors'. The BMCC fulfilled its objects of conducting investigations into complaints by engaging in a fact-finding exercise so as to be able to make a finding, which it then forwarded to ICASA. What was required was for the scheme, created in terms of the impugned provisions of the IBA Act and the Complaints Procedures, to ensure *fairness*.

Clause 1.24 of the complaints procedures also made provision for the licensee, where the finding was against it, to be afforded an opportunity to make representations with regard to the BMCC's recommendations to ICASA as to what penalty, if any, should be imposed. Should ICASA consider that a heavier penalty than that recommended by the BMCC was warranted, the licensee would be given yet another opportunity to make representations. Section 22(3)(a) provided that the chairperson of the BMCC must be a judge of the High Court, whether in active service or retired, a practising advocate or attorney with at least ten years' appropriate experience, or a magistrate with at least ten years' appropriate experience. This requirement, in my view, was aimed at ensuring fairness, impartiality and independence. The chairperson was an experienced, legally trained person. In my view, the scheme adequately ensured *fairness*." (footnotes omitted and emphasis added).

[19] SAPO's letter of 9 October 2015 states that the purpose of the SAPO complaint is "to prompt an investigation by the CCC into allegations made in the complaint", and states that "the CCC is empowered to do so in terms of section 17C(1)(b)(iii) of the ICASA Act". The reference to section 17C(1)(b)(iii) is, however, incorrect since this section provides that ICASA – not the CCC – may investigate a complaint. On this ground alone, there is no basis for SAPO's request that the CCC must investigate the complaint. The CCC is not empowered to direct any division of ICASA

to investigate a matter. Of course, the Act provides that the CCC must investigate a matter, but then the Complainant has a duty to lay a basis for such an investigation in a complaint which sets out the facts which support its complaint and also indicate the section of a relevant Act, a regulation (under the CCC jurisdiction) or a license condition which has been contravened. In certain circumstances the CCC will, when it is necessary, indeed investigate a matter, relevant to the complaint, which it believes should be investigated, although not mentioned by the Complainant. But that course is only followed where a valid complaint, supported by facts and law, has been filed.

[20] One cannot simply state the section, regulation or license condition and then step away from the complaint. That would amount to a bland complaint which is unacceptable in law.

Thus, Binns-Ward J stated the following in *Mathias International Ltd and Another v Baillache & Others* 2015(2) SA 357(WCC) at para [24]:

"Indeed it is apparent on a careful reading thereof that the applicants failed, other than by bland reference to the list quoted in para [21] above, to identify specific evidence in their founding affidavit vital to their claim which required preservation by an Anton Piller order."

The same sentiments were expressed by the same Judge in *Belville Pharmacy CC & Another v T Nortje (Pty) Ltd & Others* 2004(6) SA 442(C):

"By contrast, the replying affidavit continues to employ bland, generalised statements which did not provide any evidential support for its assertion that it would suffer direct financial harm as a result of the trading of first respondent."

In *Absa Bank v COE Family Trust & Others* 2012(3) SA 184 (WCC) at 190-1 Davis J referred to this kind of application as a "bland jurisprudential war cry".

Lastly, for present purposes, Van Schalkwyk J said the following in *Mandela v Falati* 1995(1) SA 251(W) at 256:

"In *Buthelezi v Poorter* ... Coetzee J considered the meaning to be attributed to the phrase 'defence set up' as used by Greenberg J in connection with the passage cited above. Coetzee J concluded that Greenberg J had not said, and had not intended to say, that it would be sufficient for the respondent to make the bland statement that truth and public benefit could be proved; something more would have to be said to substantiate those assertions. This, it seems to me, is the state of our common law.

[21] Although not directly relevant here, our Constitutional Court has made it clear that even a statute which is vague would be unacceptable to base a complaint or prosecution on and, in fact, void for vagueness. Thus the Court held the wording ("indecent or obscene") in the Indecent or Obscene Photographic Matter Act 1957 to be void for vagueness.[9] In *Islamic Unity Convention v IBA* 2002 (4) SA 294 (CC) the Court held the phrase "likely to prejudice relations between sections of the population" in the Broadcasting Code, which was part of the IBA Act 1993, as too vague to withstand constitutional scrutiny. It, however, replaced it with the hate speech provision in section 16(2) of the Constitution of the Republic. In *De Reuck v DPP and Others* 2004(1) SA 404(CC) the Court read down the 1999 amended and vague definition of "child pornography" and replaced it with a definition which was almost the same as the definition originally adopted in 1996 by Parliament, on the advice of the Buthelezi Task Group 1994.[10] The Court in fact held that the exclusion of context in the 1999 amendment was also unacceptable – all material must be judged in context. The Court also explained that material that qualified as art[11] would not fall within the definition of child pornography. Three Justices of the Constitutional Court also criticised and regarded as void for vagueness the 2009 amended criteria of the Films and Publications Act 1996 in *Print Media South Africa v Minister of Home Affairs and Another 2012 (6) SA 443 (CC).* The other justices (the majority) stated that it was not necessary for their finding of constitutional invalidity of pre-control over publications to include a reference to the vague language. Pre-control of publications was, as such, unconstitutional and it was not necessary to support that finding by also referring to the vague definitions.

[22] The CCC does not have the competence in law to provide details for the SAPO complaint. That is why the CCC Chair directed SAPO to furnish further particulars. He did so in his letter of 11 August 2015, where it was stated that the CCC "cannot, of course, reformulate the complaint and fill in the alleged gaps." In addressing this letter to SAPO, it was accepted that the SAPO complaint in its present form was *prima facie* inadequate. However, SAPO declined to furnish any further particularity. In its letter of 9 October 2015, SAPO states that "the information currently available to SAPO is contained in the original submission to the

---

[9] *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security 1996 (3) SA 617 (CC).*

[10] Published by the Government Printer on 3 March 1995.

[11] The test is whether the material, judged as a whole, would lead the reasonable person to regard it as of substantial aesthetic value.

CCC" and that "if additional information is required SAPO does not have such information".

[23] It was argued by Mr *Cockrell* that SAPO's stance has two consequences – both of which, according to his argument, are fatal to the SAPO complaint. The first consequence is that the respondents cannot be called upon to answer the SAPO complaint since this would violate their right to procedural fairness. Secondly, in its present form, the SAPO complaint was lacking in adequate particularity. Mr *Cockrell* elaborated on the reasons for this by considering each aspect of the complaint in turn.

1. The complaint against Aramex/Pick 'n Pay/DHL:

   1.1 It is unclear what provision of which Act is alleged to have been contravened.

   1.2 It is unclear whether the complaint is against Aramex only or whether it is against Aramex, Pick 'n Pay and Fresh Stop. If the complaint is directed against Aramex only, it is unclear why Pick 'n Pay and Fresh Stop have been cited.

   1.3 The allegation that reserved postal services are provided "in association" with Pick 'n Pay and Fresh Stop does not indicate the nature of the alleged association; does not describe the alleged involvement of Pick 'n Pay and Fresh Stop; and does not indicate how this is related to the alleged provision of reserved postal services.

   1.4 No particularity is given as to when the conduct is alleged to have taken place.

   1.5 No particularity is given as to where the conduct is alleged to have taken place.

   1.6 No particularity is given as to what conduct has allegedly been performed by Aramex, Pick 'n Pay and Fresh Stop in relation to "letters and parcels of less than and including one kilogramme" and/or "letters and parcels of dimension smaller than 458mm x 324mm x 100mm".

1.7 It is not apparent whether the conduct that forms the subject matter of the complaint:

1.7.1 relates cumulatively to "letters and parcels of less than and including one kilogramme" and "letters and parcels of dimension smaller than 458mm x 324mm x 100m"; or

1.7.2 relates in the alternative to "letters and parcels of less than and including one kilogramme" or "letters and parcels of dimension smaller than 458mm x 324mm x 100m".

1.8 It is therefore – so the argument ran - not clear whether the SAPO complaint alleges that Aramex had failed to comply with the mass and the size limitations in Schedule 1 to the Postal Services Act.

With regard to the complaint against PostNet/Aramex/DHL and in regard to the complaint against 3@1/Aramex/DHL a similar argument was put forward and it is not necessary to repeat what has been said above.

CONCLUSION ON THE APPLICATION TO DISMISS THE COMPLAINT

[24] *Firstly*, as indicated above, a bald complaint is unacceptable in law. It was suggested by Mr *Thenga*, arguing the case on behalf of SAPO,that the CCC, as part of its investigation, could require information from the respondents and then, as it were, provide details to SAPO in formulating the complaint.
To our minds this very method of investigation would be in dire conflict with the fairness rule, as required for any exercise of the CCC's investigative function by Mpati AJ in the *Islamic* case. The CCC would, effectively, become part of the "prosecution" and thereby, as an Administrative Tribunal, act in conflict with its duty to be impartial and fair in its procedure and final decision.

[25] *Secondly*, the right to procedural fairness includes the right to know the case that an affected party is required to meet. The reason for this is that:
"A man cannot meet charges of which he has no knowledge: A man who has to give evidence that he is of a respectable and deserving character *is merely beating the air if the tribunal before which he goes declines to give him any indication of the points against him and which have to be met*: How for instance is a man to anticipate a

charge that he is being declared a prohibitive immigrant and offer satisfactory evidence to the contrary, when the point has never been put to him?"[12]

Thus "a right to a hearing includes the provision of such information which would render the hearing meaningful in that [the respondent] is given an opportunity to know all the ramifications of the case against him and thereby is provided with the opportunity to meet such a case".[13] This right is also part of the *audi alteram partem* rule, which is an ingredient of procedural fairness.

Procedural fairness includes that the respondents are entitled to know the case they are required to meet before they are called upon to answer it. However, for the reasons stated above, the SAPO complaint does not furnish the respondents with sufficient particularity to know the case they are called upon to meet. When SAPO was directed to address the issues raised in the respondents' request for further particulars, the problems which could arise from such inadequacies in the SAPO complaint were foreseen. SAPO was afforded an opportunity to address those inadequacies, but SAPO declined to do so and stated that it did not have more information. In such circumstances, it would be plainly unfair to require the respondents to answer the SAPO complaint in its original form. In the absence of further particularity, the respondents would be "beating the air" and participating in a process that is fundamentally unfair.

[26] *Thirdly*, a consequence of SAPO's stance is that the CCC may not accede to any request that it should investigate the SAPO complaint without calling upon the respondents to answer the complaint. Section 17C(2) of the ICASA Act regulates the procedure to be followed by the CCC. It provides that, before the CCC hears a matter, it must furnish the licensee with a copy of the complaint and must afford the licensee a "reasonable opportunity to respond to the allegations in writing". However, SAPO declined to furnish the particularity sought by the respondents, indicating that they do not have particulars and are dependent on an investigation by the CCC; alternatively, that the matter should be left in abeyance until it had gathered the necessary details itself. Given the absence of any detail of the alleged contraventions in the complaint against the respondents, no rational answer could be prepared by the

---

[12] *Kadalie v Hemsworth* NO 1928 TPD 495 at 506. The reference to "man" must obviously read "person" and likewise, "he" should also be read as "she".

[13] *Nisec (Pty) Ltd v Western Cape Provincial Tender Board* 1998 3 SA 22 (C) at 235C.

respondents. Accepting such a complaint is doomed to lead to a miscarriage of justice. It would mean that un-named alleged contraventions could be kept alive for as long as the "abeyance" lasts. A Respondent is entitled to have the matter against it concluded within a reasonable time. Leaving the matter in abeyance and thus shelving it until the Complainant gets its ducks in a row, flies in the face of that time-honoured constitutional principle.

[27] *Fourth,* where fairness permits that the CCC must go beyond the documentation (thus investigate") during a hearing, for example, require more details from one of the parties, it will do so. This was, for example, done in *Nowmedia v SAPO*[14] where SAPO was required to file an affidavit as to what alternative steps it took to deliver postage during an unprotected strike. In *Caxton and CTP Publishers and Printers Ltd v Multichoice Africa (Pty) Ltd and Electronic Media Network Ltd* [15] the CCC however, turned down an application by the complainants to initiate a search as to the identity of a large number of foreign shareholders in the respondent. Such an investigation was regarded as unfair and amounting to a fishing expedition. The Chairperson of that session of the CCC, Prof Piet Delport, stated as follows:

> "Further investigation by the CCC was, however, contended for by Caxton. Fairness, however, dictates that the inquiry ends here and that the CCC should not embark on a "fishing expedition" on mere speculative allegations."

[28] There might be circumstances within which the CCC would permit a Complainant to provide more details itself, as it has done in the Municipality[16] cases – permitting SAPO, on application at the hearing of the matter, to file affidavits as to the particulars. In that matter there was, however, no application from the respondents before the CCC to declare the complaint invalid. However, in the present matter, the respondents raised what, in Court terms, is called an exception based on the Complaint not disclosing a "cause of action." Procedurally this was permissible and, in fact, followed upon a directive by the Chairperson of the CCC in terms of section 17(6) of the ICASA Act that the matter be argued *in limine* on the complaint plus the correspondence up to that stage. In contrast to the Municipality cases, here was no application from SAPO in the present matter to file affidavits *within a certain period.*

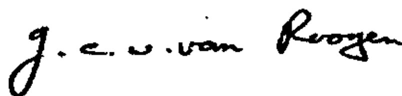
[14] Case 126 / 2015
[15] Case 37/2010
[16] Part of the present letter of complaint by SAPO.

In fact, the approach of SAPO was that the matter should be left in abeyance until such time as SAPO had gathered evidence – in the absence of the CCC undertaking such investigation. Acceding to such a request would plunge the matter into uncertainty and prolong the matter beyond a reasonable time. In any case, no case was made out that such evidence was likely to be gathered.

[29] It should be mentioned that the above approach should not be understood to exclude complaints which are not perfectly formulated. That would close the gate for persons who are not experts in law. Furthermore, as Malan J (as he then was) pointed out in *SA Jewish Board of Deputies v Sutherland NO 2004 (4) SA 368 (W)*[17] fairness and the gravity of the issue might require that a hearing takes place.

[30] In the result the complaint against the Respondents, as formulated in the letter quoted in paragraph [3] of this judgment, is dismissed. In Court terms the CCC is upholding the exception to the complaint on the basis that it does not reveal a cause of action.

[31] In the light of this finding, no advice on sanction is referred to Council and the judgment is sent to Council for noting.



JCW VAN ROOYEN SC **30 March 2016**
CHAIRPERSON

The Members of the CCC agreed with the conclusion reached.

[17] At para [33] and [34]. A matter relating to the Broadcasting Monitoring Complaints Committee, which was the complaints committee of the IBA and thereafter of ICASA up to July 2006.