COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Hearing: 16 November 2015 **CASE NUMBER 112/2015**

SOUTH AFRICAN POST OFFICE SOC LTD **COMPLAINANT**

V

MATLOSANA LOCAL MUNICIPALITY **RESPONDENT**

SUMMARY BY CHAIRPERSON

[1] In April 2015, the Office of the Coordinator of the Complaints and Compliance Committee ("CCC") received a complaint from the South African Post Office SOC LTD ("SAPO"). The Complaint was directed at certain companies and thirty municipalities which, according to the Complainant, were delivering postal articles which are reserved by the Postal Services Act for delivery by SAPO. SAPO requested the CCC to investigate the complaint and recommend the appropriate sanction to the Council of ICASA. The complaint did not contain any details but was limited to a bland statement that the Act was or was being contravened by the respondents. The Chairperson divided the case against the municipalities and the companies into two hearings.

[2] A the hearing of the Municipalities, where 11 municipalities were present, Matlosana Municipality requested to plead first. A plea of guilty was recorded and an undertaking given that the practice would be stopped after due notice to the part time employees employed.

[3] The CCC held the complaint to be lacking in any factual detail and regarded it as invalid.

[4] The question then arose how the CCC should deal with the fact that the Respondent had pleaded *guilty*. The legal question which arose was whether a plea of guilty to a complaint which was invalid in itself should carry any weight in law. The answer to that was in the negative, based on

High Court authority.

[5] In the result the plea of guilty was nullified and the complaint dismissed.

In the light of this finding by the CCC, there was also no recommendation as to sanction placed before the Council of ICASA.

The above finding on the merits is, accordingly, sent to Council for noting.

Chairperson

25 March 2016

COMPLAINTS AND COMPLIANCE COMMITTEE[1]

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V

MATLOSANA LOCAL MUNICIPALITY **RESPONDENT**

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: Adv PG Seleka instructed by Madhlopa Incorporated

For the Respondent: Attorney A Mazabane from Mazabane Attorneys, Matlosana

Coordinator: Ms Lindisa Mabulu

[1] 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 underlying statutes or regulations - including the Postal Services Act 1998,where registered postal services are included- are justified. Where a complaint or reference is dismissed on the merits 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 on the sanction, 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.

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] In April 2015, the Office of the Coordinator of the Complaints and Compliance Committee ("CCC") received a complaint from the South African Post Office SOC 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.[2]

[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 postal articles, which do not fall within the postal category reserved by law for SAPO. The letter then lists 30 municipalities which, according to the Complainant, are or were involved in the delivery of postal articles which is reserved by legislation to be delivered only by SAPO. Eleven municipalities were present at the hearing. Mzimbuvu Municipality applied for a postponement beforehand and that was granted. The other eighteen Municipalities did not respond to the Complaint. We will only deal with the complaint against Matlosana Municipality in this judgment. This is so since the said Municipality requested to be heard first and a decision was reached on in its case. All the other municipality cases were postponed, without any opposition from the municipalities present, so as to grant SAPO an opportunity to prepare affidavits to support its complaints against them, insofar as SAPO planned to go ahead with the complaints against them. A fixed date was set for the lodging of the affidavits.

THE COMPLAINT

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

[2] Prof van Rooyen.

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 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.[3] 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.

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

[3] 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).

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.[4]

Conclusion

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);[5] and to order them to take any remedial action that may be necessary."

[4] A list of 30 municipalities is then provided, among which, the respondent in this matter.

[5] As mentioned, the Municipality of Matlosana requested to plead first. The transcript reads as follows (with the legal representative of Matlosana Municipality, Mr Mazabane, addressing the CCC):

> *We act on behalf of Matlosana Local Municipality in the abovementioned matter. In an endeavour to expeditiously resolve this matter and save the time of everyone, our client hereby enters an admission of guilt. You are kindly referred to a copy of a letter attached hereto for an explanation, which has been put forward by Matlosana Local Municipality. The letter is attached hereto. We humbly appeal to the CCC not to impose any financial penalty, as remorse has been shown by admission of guilt, thus saving the CCC its precious time.*
>
> *Lastly, as clearly demonstrated by the aforesaid letter from Matlosana Local Municipality, the contravention has never been intended to be disdainful. We hope our humble appeal will receive your sympathy. We trust you will find the above in order, yours faithfully, WA Mazabane Attorneys".*

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

[5] 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.

[6] Mr Mazabane was requested to also read an earlier letter from his client to the Coordinator into the record:

> *"Your letter dated 3 July 2015 in the abovementioned regard has reference and is here within acknowledged. It is with utmost regret that the City of Matlosana, in its view of the SAPO's poor service delivery, erroneously provided reserved postal services without having a licence registered in terms of the Postal Services Act and take note of the allegations of transgressing the Independent Communications Authority of South Africa Act No. 13 of 2000, as amended, ICASA, as contained in the SAPO letter of complaint dated 14 April 2015 attached to the abovementioned letter.*
>
> *Providing reserved postal services was mainly conducted with the delivery of service accounts from the finance department on the City of Matlosana with the following responses provided in defence of the allegations. Due to the fast-growing demographic area of the municipality, areas were and are unknown to the Post Office and mail are returned to sender, RTS. The same reason causes a high loss of income to the council. The City of Matlosana is sending out high amounts of service accounts and it is experienced that the delivery of service accounts by the Post Office is slow and cause(s) consumers to miss payment deadlines as well as causing a high volume of phone calls to the municipality to enquire about the amounts paid on service accounts.*
>
> *The office of the Speaker embarked on a project of job creation in the community whereby some voluntary jobless community members could earn money with delivering service accounts on behalf of the City of Matlosana, especially in township areas where owners indeed (could) be verified. In order to rectify and comply with the provisions of the ICASA Act, the following will be done: Notice of termination of service will be served to the voluntary jobless community members that assisted the City of Matlosana with effect from the 1st of August 2016; all monthly service accounts will be handled according to the requirements and sent to the Post Office for delivery and if and when losses will be experienced by the City of Matlosana due to non-delivery of service accounts, it will be reported to the Complaints and Compliance Commissioner with a request to mediate a settlement between SAPO and the City of Matlosana, trusting you will find the above in order".*

DEFICIENCY OF COMPLAINT

[7] Procedurally we have the following problem with this plea. It followed upon a complaint from SAPO which did not qualify as a complaint in terms of the ICASA Act. The complaint simply amounted to a bland statement of the law, without any substantiation as to facts. Our Courts have often stated that bland statements do not qualify as a basis for an application. The same approach would apply to a complaint in terms of the ICASA Act. Thus, Binns-Ward J stated the following in M*athias International Ltd and*

Another v Baillache & Others 2015(2) SA 357(WCC) at pra [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."

These sentiments were also 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.

[8] 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.[6] In *Islamic Unity Convention v IBA* 2002 (4) SA 294 (CC) the Constitutional 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[7] in section 16(2) of the Constitution of the Republic. In *De*

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

[7] Which also includes, as part of section 16(2) of the Constitution of the RSA, incitement to violence and propaganda for war.

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.[8] 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 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).*[9]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.

WEIGHT TO BE ATTACHED TO THE PLEA OF GUILTY

[9] The crucial question is whether the CCC should simply accept the plea of guilty by the Matlosana Municipality and advise Council as to a sanction. By doing so, the CCC would, however, be closing its eyes for a crucial defect in the complaint. To simply state that a Municipality has or is contravening the Postal Services Act by delivering postal articles the delivery of which is reserved for SAPO, cannot qualify as a complaint, without substantiation – as appears from the judgments referred to in paragraph [7]. The Complaint must be substantiated by facts and supporting evidence would have to be provided of such facts. A mere assumption or suspicion would not suffice. It is true that the CCC has an investigative function. However, that function may only, according to the Constitutional Court, be exercised in a fair manner. Thus Mpati AJ stated as follows 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

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

[9] The majority did not find it necessary to express an opinion on vagueness, since it regarded pre-control of publications with explicit sexual content, instituted by a 2009 amendment to the Act, as sufficient to declare the amendment null and void.

> 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)

[10] It would be particularly unfair if a complainant were to be permitted to initiate its complaint by a bland statement which, in effect, almost repeats the wording of the prohibition. That would imply that the CCC should take it from there and commence investigating the facts and, as it were, substantiate the complaint. That must be the task of the Complainant – as clearly appears from the judgments cited in paragraph [7]. In fact, the word "complaint" implies that a basis for it must be placed before the CCC – a basis that must be supported by averments which relate to facts which would be placed before the CCC by way of oral evidence or affidavit. Only when, in the opinion of the CCC, it becomes necessary to divert the inquiry into an aspect which is relevant and necessary, the CCC would investigate such a matter – however, constantly with the utmost respect for fairness, as rightly required by Mpati AJ in the *Islamic* case cited above.

[11] The final question is, however, how we should deal with the fact that the Respondent pleaded *guilty*. The legal question which arises is whether a plea of guilty to a complaint which is invalid in itself should carry any weight in law. Could it, as it were, give life to the complaint. The answer to that must be in the negative. A good example is provided by the Full Bench decision of the Transvaal Provincial Division of the High Court (now the North Gauteng High Court) in *Senyolo v The State.*[10] In this matter the

[10] [2007] (LexisNexis) *Judgments Online* 19632(T).

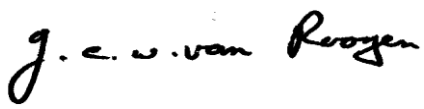
Appellant had been found guilty on five charges of theft based on his admission of guilt. The regional magistrate, however, did not ask him the obligatory questions as to whether he understood what he was admitting. The High Court, on appeal, held that he had been convicted irregularly and, in the light of the fact that he had already been in prison seven years (awaiting the hearing of his appeal), set aside the convictions and did not, as required by the Criminal Procedure Act, refer the matter back for a re-trial. He had a constitutional right to have had his trial concluded within a reasonable time and this right would have been affected if he had to be tried again. In effect this meant that the charge had become null and void and that his plea of guilty was also a nullity.

CONCLUSION

[12] In the present matter the complaint before us was null and void for not having been based on any specific claims with reference to facts or alleged facts. The case of SAPO cannot, in any manner, be bolstered by the admission of the Respondent. There was no valid complaint to plead on. Accordingly, the plea of guilty has also fallen away.

In the result the plea of guilty is nullified and the complaint is dismissed. In the light of this finding by the CCC, there is also no recommendation as to sanction placed before the Council of ICASA.

The above finding on the merits is accordingly sent to Council for noting.



JCW VAN ROOYEN SC **25 March 2016**

The members of the CCC who were involved in the hearing agreed with the conclusion reached.