

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 9 April 2016

CASE NUMBER 128 /2015

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IN THE MATTERS BETWEEN

TELFREE COMMUNICATIONS (Pty) Ltd

APPLICANT

AND

CELL C (Pty) Ltd

RESPONDENT

PLUS

TELFREE COMMUNICATIONS (Pty) Ltd

APPLICANT

AND

VODACOM (Pty) Ltd

RESPONDENT

Committee: Prof JCW van Rooyen SC, Ms Nomvuyiso Batyi, Mr Jacob Medupe, Prof Kasturi Moodaliyar, Mr Jack Tlokana and Ms Mapato Ramokgopa

For the Applicant in both matters: Adv JC Klopper instructed by Nic Maritz Attorneys, Pretoria

For the Respondent in the Cell C matter: Adv Jonathan Berger instructed by Roy Suttner, Johannesburg

For the Respondent in the Vodacom matter: Frank Snyckers SC instructed by Cliffe Dekker Hofmeyr, Johannesburg

JUDGMENT

JCW Van Rooyen SC

[1] Telfree Communications (Pty) Ltd (“Telfree”), applied to the Independent Communications Authority of South Africa (“ICASA”) in terms of section 37(4) of

the Electronic Communications Act 2005 (“ECA”) to have an interconnection dispute resolved between itself and Cell C (Pty) Ltd and itself and Vodacom (Pty) Ltd. The ICASA Council referred the matters in terms of section 37(4)(c) of the Electronic Communications Act 2005 (ECA) to the Complaints and Compliance Committee, an administrative tribunal, which functions independently¹ within the wider ambit of ICASA, to resolve the dispute on an expedited basis. In contrast to complaints lodged with the CCC in terms of the ICASA Act, the CCC does not, once it has reached a decision in terms of section 37(4), refer the matter to the ICASA Council for imposition of a sanction. In fact, a sanction is not on the agenda in a case such as the present. The expedited resolution of the dispute is at the core of the matter. There are other sections under the ECA in terms of which the CCC also functions in a similar manner.

[2] So as to understand the issues within context, it is necessary to quote section 37 of the ECA as a whole:

37. Obligation to interconnect

- (1) Subject to section 38, any person licensed in terms of Chapter 3 must, on request, interconnect to any other person licensed in terms of this Act and persons providing service pursuant to a licence exemption in accordance with the terms and conditions of an interconnection agreement entered into between the parties, unless such request is unreasonable.
- (2) Where the reasonableness of any request to interconnect is disputed, the person requesting interconnection may notify the Authority in accordance with the regulations prescribed in terms of section 38 and the Authority must, within 14 days of receiving the request, or such longer period as is reasonably necessary in the circumstances, determine the reasonableness of the request.
- (3) For the purposes of subsection (1) a request is reasonable where the Authority determines that the requested interconnection -
 - (a) is technically and economically feasible; and
[Para. (a) substituted by s. 19 of Act 1/2014 w.e.f. 21 May 2014]
 - (b) will promote the efficient use of electronic communications networks and services.
- (4) In the case of unwillingness or inability of a licensee to negotiate or agree on the terms and conditions of interconnection, either party may notify the Authority in writing and the Authority may -
 - (a) impose terms and conditions for interconnection consistent with this Chapter;

¹ *Islamic Unity Convention v Minister of Telecommunications and Another* 2008 (3) SA 383 (CC).

- (b) propose terms and conditions consistent with this Chapter which, subject to negotiations among the parties, must be agreed to by the parties within such period as the Authority may specify; or
 - (c) **refer the dispute to the Complaints and Compliance Committee for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 38.²**
- (5) For purposes of subsection (4), unless otherwise agreed in writing by the parties, a party is considered unwilling to negotiate or unable to agree if an interconnection agreement is not concluded within the time frames prescribed.
 - (6) The interconnection agreement entered into by a licensee in terms of subsection (1) must, unless otherwise requested by the party seeking interconnection, be non-discriminatory as among comparable types of interconnection and not be of a lower technical standard and quality than the technical standard and quality provided by such licensee to itself or to an affiliate or in any other way discriminatory compared to the comparable network services provided by such licensee to itself or to an affiliate.

[3] The Applicant provides a Short Message Service (SMS) to its clients and for this purpose has to interconnect with the respondents. Both the respondents are licensed mobile phone operators and there is a dispute between Telfree and the respondents as to the rate charged by the respondents. A third application against MTN (Pty) (Ltd), also a mobile phone operator, fell through as a result of the fact that MTN had lodged a successful application to the High Court, obtaining a declaratory order that an agreement had been reached between itself and Telfree and that the matter before ICASA, accordingly, was no longer relevant.

[4] I made a procedural ruling in terms of section 17(6) of the ICASA Act³ that Telfree had to file founding affidavits by 9 November 2015 and that Cell C and Vodacom had to file answering affidavits on or before 18 November 2015. Telfree filed its founding affidavit in time. Cell C and Vodacom were, on application, granted leave to file their answering affidavits by 7 December 2015. Both respondents raised the point that the CCC did not have jurisdiction to resolve the dispute but, nevertheless, also dealt with the merits of the matter. I need not go into that for present purposes.

[5] A pre-hearing conference was held in terms of section 17C(4) of the ICASA

² Bold added.

³ Section 17(6) provides as follows: "The meetings of a committee (including any special meetings) must be convened by the chairperson, who determines the procedure at the meeting."

Act on 30 January 2016.⁴ At this conference the CCC directed that Telfree's replying affidavits had to be filed by 16 February 2016. An application for condonation of this late-filing had to be included, which would then be considered at the first day of the hearing on 9 April 2016. Since the issues were almost identical, it was decided that *both* respondents would be present on the 9th April 2016. If deemed necessary, the matters would, thereafter, be dealt with separately. Deadlines were determined for the filing of heads of argument: 24 March 2016 for Telfree and 1 April 2016 for Cell C and Vodacom.

[6] Telfree did not file its replies, as determined, on 16 February 2016. Instead, Telfree's attorneys stated that it was not clear from their (and their counsel's) notes whether the replies were due on the 16th or the 19th. In any event, Telfree requested a further extension until the 22nd February to file the replies. I granted the request for extension in terms of section 17(6) of the ICASA Act, subject to an application for condonation by the CCC. A medical certificate, confirming the illness (and thus, his not having been available) of the Managing Director, was also required. On the 22nd the replies were nevertheless, not filed. Finally, the Replies were filed on the 5th of April 2016, which made them six weeks late and four days before the hearing on the 9th April 2016.

[7] On the 24th March 2016 Telfree missed its deadline for filing heads of argument. These were, however, filed on 1 April 2016. On the 6th April 2016 an application for the condonation for the late filing of the Replies was filed. Essentially, the accent was placed on the illness of the Managing Director, his slow recovery and his busy schedule. Reference was also made to the lengthy period that was taken by Vodacom to file its submission to ICASA, after the matter was brought before the Council of ICASA. The said late filing by Vodacom is, of course, not relevant for the papers which had to be filed in the process before the CCC, for which specific dates were set.

[8] On the 9th April 2016, minutes before the hearing commenced, hard copies of the Applicant's "additional heads" were handed to Cell C's counsel. Mr

⁴ Section 17C(4) provides as follows: "The Complaints and Compliance Committee may hold a pre-hearing conference for the purpose of giving direction to the parties regarding the procedure to be followed at a hearing and other relevant matters determined by the Complaints and Compliance Committee."

Berger, appearing for Cell C, mentioned that it was impossible for him to be ready to argue the matter on the 9th. He also opposed the late filing of the Reply.

[9] Mr *Snyckers*, appearing for Vodacom, argued that the late filing of the Reply in this matter amounted to its being vexatious in terms of the CCC Regulations and that the CCC should, on this ground, not condone the late filing of the Reply by Telfree. However, when on closer examination it surfaced that the definition of vexatious⁵ in the Regulations did not cover a late filing, he argued that the late filing was vexatious in terms of common law and, in any case, in contempt of the CCC's rulings as to dates. Vodacom had complied with the time lines, but Telfree clearly, in his view, regarded the time lines with contempt.

[10] It will be useful to provide an overview of the relevant dates:

- 13 August 2015: Telfree lodges its reference affidavit with ICASA
- 29 September 2015: the Coordinator informs Cell C and Vodacom that the matters were referred by Council to the CCC in terms of section 37(4)(c) of the ECA
- 28 October 2015: Coordinator informs Cell C and Vodacom of chair's procedural ruling giving dates for filing of affidavits: 9 November for Telfree, and 18 November for Cell C and Vodacom
- 9 November 2015: Telfree files its founding affidavit
- 18 November 2015: in response to Cell C's earlier correspondence of 13 November 2015, Cell C is given until 7 December 2015 to file its answer. Vodacom was given the same extension. Affidavits filed in time, Cell C's affidavit not yet signed and commissioned. However, so filed on the 8th December.
- Telfree indicates that it will only be in a position to file its replies by 29 January 2015, but this date is not met.
- 30 January 2016: At the pre-hearing meeting, the CCC indicates that the reply must be filed by 16 February, together with an application for condonation. Deadlines are agreed upon for filing heads: 24 March for Telfree, and 1 April for Cell C and Vodacom
- 16 February 2016: No reply is filed by Telfree. Instead, Telfree's attorneys state that it is not clear from their (and their counsel's notes) whether the reply was due on the 16th or the 19th. In any event, they request a further extension until the 22nd to file.
- 22 February 2016: Chair grants extension, requiring the reply to be filed with an application for condonation and a medical certificate (regarding Managing Director's health). Reply is still not filed.
- 24 March 2016: Telfree misses deadline for filing heads.
- 5 April 2016: Reply by Telfree filed (six weeks late).
- 6 April 2016: Condonation application by Telfree filed.

⁵ "vexatious complaint or dispute" is a complaint or dispute filed by a person who has persistently and without any reasonable ground filed a complaint or dispute with the CCC or the Authority against a licensee, whether against the same licensee or against different licensees.

- 9 April 2016: Day of hearing - hard copies of "additional heads" (the first set of Telfree's heads dealing with the Cell C matter) handed to Cell C just minutes before hearing begins.

[11] The CCC considered the application by Telfree for condonation for the late filing of its Replies. No explanation was offered for the delay post 22 February 2016. Also, there was no explanation why deponents to the reference or founding affidavits could not depose to the Reply. Having taken into consideration the illness of the Managing Director and the vast amount of paper work which had to be done by Telfree, the conclusion which was reached was that although the late filing was not strictly in contempt of the proceedings – the word “contempt” having a specific connotation in proceedings before a Court as an intentional denigration of the integrity of the Court⁶ – the Replies had been filed six weeks late and, in that sense, the omission to file was, in the wide sense of the word, in contempt of the time lines agreed to at the pre-hearing conference held on the 29th January 2016. The effect thereof was that the proceedings on the 9th April 2016, as a result of the late filing, could simply not amount to a fair hearing.

ORDER

[12] The two matters were, accordingly, removed from the Roll of the CCC on the basis that:

(1) the proceedings could not be fair as a result of lack of timeous filing by the Applicant; and

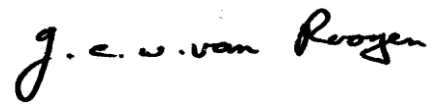
(2) to postpone the matter would also be unfair, given the fact that section 37(4) of the Electronic Communications Act prescribes that the matter should be resolved by the CCC on an expedited basis and that 9 April 2016 was set aside for a full scale commencement of the hearing – which could not, realistically, take place on that day.

This decision was conveyed to the parties after the hearing on the 9th.

[13] Since no decision was reached on the merits of the application, Telfree may, of course, initiate these proceedings again by filing an application with the ICASA Council to consider the matter in terms of section 37(4) of the Electronic

⁶ Cf. *S v Mamabolo* (ETV & Others Intervening) 2001(3) SA 409(CC): “Therefore, the offence is particularly concerned with the publication of comments that reflect adversely on the integrity of the courts as opposed to mere reflections on their competence or the correctness of their decisions.”

Communications Act, which includes referring the matter to the Complaints and Compliance Committee again.

A handwritten signature in black ink, reading "J.C.W. van Rooyen". The signature is written in a cursive style with a large initial 'J'.

JCW Van Rooyen SC

24 May 2016

Chairperson

The Members concurred.

