Case number: 39/2010

BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE
(of ICASA)

In the matter of a dispute between:-

TELKOM SA LIMITED **Applicant**

and

MTN (PTY) LIMITED **Respondent**

COMMITTEE'S DECISION

Introduction

1. On 22 July 2010, the Independent Communications Authority of South Africa (Icasa) referred, in terms of s 37(4) of the Electronic Communications Act[1] (the ECA), a dispute to its Complaints and Compliance Committee (the CCC), that is, this Committee. The dispute concerned a complaint Icasa had received from Telkom SA Limited (Telkom) against Mobile Telephone Networks (Pty) Ltd (MTN). Telkom's complaint was that despite its request to MTN to enter into an interconnection agreement, MTN was unwilling or unable to do so.

[1] No 36 of 2005

unable to do so.

2. From the papers that were placed before us, it emerges that MTN was in principle not averse to concluding an interconnection agreement with Telkom. However, the obstacles to the conclusion of an agreement were principally two-fold. First, whilst Telkom demanded that MTN pay to Telkom a rate of 93c a minute for calls, whether commercial or on Community Service Telephones (CSTs), terminating on Telkom's network, in respect of commercial calls MTN was prepared to pay only 89c, which is what it paid to other mobile operators and what it intended to charge Telkom for calls terminating on its (MTN's) network. In respect of CSTs, MTN was prepared to pay only 6 cents, which was the rate agreed upon between it and the other mobile operators. Second, MTN insisted that the agreement includes a clause prohibiting interconnection bypass.

3. The essence of the "relief" which Telkom seeks is as follows. First, the CCC must make the following findings: MTN is in breach of its obligations under s 37(1) of the ECA; and MTN is unable or unwilling to negotiate or agree to an interconnection agreement [notwithstanding that] it is, in terms of s 37 of the ECA, "not unreasonable". Second, the CCC must recommend [to Icasa] that Telkom and MTN must conclude an interconnection agreement on

the terms proposed by Telkom, including that: the termination call rate, in respect of both commercial and CST calls, that MTN must pay to Telkom for calls terminating on Telkom's network will be 93c a minute; the agreement omits any reference preventing interconnection bypass.

4. It might be recorded at the outset that MTN opposes the grant of any relief to Telkom. In the main, it contends as follows. First, the CCC does not have jurisdiction to hear Telkom's complaint at all. For convenience, I will refer to this as "the general jurisdictional challenge". Second, if the CCC had the general jurisdiction to hear Telkom's complaint, it does not have the jurisdiction to grant the relief that Telkom seeks in respect of call termination rates. For convenience, I will refer to this as the "specific jurisdictional challenge". Third, even if the CCC was entitled to deal with the merits and in principle grant relief, Telkom had not made out a case for the relief sought. MTN asked that Telkom's complaint be dismissed.

5. It might also be noted that MTN and Telkom have entered into an interim agreement in terms of which there is interconnection between them. The basis of that interconnection is a draft agreement sent by Telkom to MTN on 23 July 2010, as qualified by a letter that Telkom sent to MTN on 2 September 2010.

6. The record of the proceedings is quite voluminous, consisting of more than 1 200 pages of affidavits and annexures. It should be recorded that initially Telkom's referral, MTN's response and Telkom's reply were not in affidavit form. However, on 8 September 2010, the day on which the hearing into Telkom's complaint was scheduled to commence, and after hearing the parties, we ruled that Telkom's complaint, MTN's answer and Telkom's reply must be in affidavit form. The hearing was then adjourned to 29 September and 1 October. The parties duly filed affidavits and the annexures thereto. On 29 September, the matter was adjourned to 2 October to enable Telkom to file a further affidavit from its expert.

7. The parties were represented throughout. Their representatives in addition to making oral submissions on each of the three days when the matter was heard, handed in comprehensive written submissions, for which we are most grateful.

8. The parties in their affidavits (together with the annexures) and through their representatives raised a wide range of issues on which they differed quite sharply. For example, Telkom accused MTN of adopting a "string-along" strategy to its request for an interconnection agreement, an accusation which was hotly disputed by MTN. In

addition, Telkom contended that MTN had effected a significant shift in respect of the basis on which it opposed Telkom's interconnection proposal. This, too, was strenuously disputed by MTN. There are many other issues on which the parties adopted quite contrary positions. However, having considered all the material that was placed before us and the submissions of the parties' representatives, it seems to me that the principal matters that have to be decided are the following: does the CCC have the jurisdiction to consider Telkom's complaint ("the general jurisdiction challenge"); if it does, does it have the power to grant the relief that Telkom seeks in respect of call termination rates ("the specific jurisdiction challenge"); if it does, should it grant the relief sought; and what is the status of the resolution take by the CCC in terms of s 37(4)(c). These are the principal matters that will be canvassed in this decision.

The general jurisdiction challenge

9. As is clear from the nature of Telkom's complaint, this is an interconnection dispute. Matters concerning interconnection are dealt with in Chapter 7 of the ECA. For present purposes, the relevant provisions of Chapter 7 may be summarized as set out in the paragraphs hereunder. However, because the provisions of s 37 of the ECA are central to the jurisdictional challenges raised by MTN

and also the merits of Telkom's complaint it is necessary to set out them out in full. After that, in the paragraphs that follow and to the extent that is necessary the other statutory provisions that are relevant to the resolution of this dispute will be summarized.

10. Section 37 of the ECA provides as follows:

> (1) Subject to s 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 services 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 the interconnection may notify [Icasa] in accordance with the regulations prescribed in terms of section 38 and [Icasa] 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.
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> (3) For the purposes of subsection (1) a request is reasonable where [Icasa] determines that the requested interconnection-
>
> (a) is technically and financially feasible; and
>
> (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 [Icasa] in writing and [Icasa] may-
>
> (a) impose terms and conditions of interconnection

consistent with this chapter which, subject to negotiations among the parties, must be agreed to by the parties within such period as [Icasa] may specify; or

(b) refer the dispute to the [CCC] for resolution on an expedited basis in accordance with the procedures prescribed in terms of section 38.

(5) For the 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 provided by such licensee to itself or an affiliate.

11. Section 38 of the ECA, which like s 37 is a part of Chapter 7, deals with interconnection regulations. Sub-section 1 provides that Icasa must prescribe regulations to facilitate the conclusion of interconnection agreements by stipulating interconnection agreement principles. The regulations may include any regulations referred to in s 39. The further provisions of s 38 are not directly relevant to the dispute and are for that reason not set out or summarized herein. The same applies to other sections of Chapter 7 the ECA, save s 41, which provides as follows. Icasa may prescribe regulations

establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specific types of interconnection and associated interconnection services taking into account the provisions of Chapter 10.

12. As emerges hereunder, MTN contended that the provisions of sections 17A to 17E, on some of which Telkom had relied in supporting its contention that the CCC had jurisdiction to hear the matter and to grant the relief it sought, could not be taken into account. For the reasons which are set out when MTN's contentions are considered, I am of the view that there is no merit in MTN's contentions. Accordingly, the relevant provisions of those sections are summarized hereunder.

13. The CCC has been established by Icasa in terms of s 17A of the Icasa Act.[2] In terms of s 17B of the Icasa Act, the CCC's functions are as follows. First, it must investigate, and hear if appropriate, and make findings on the following: all matters referred to it by Icasa; complaints received by it; and allegations of non-compliance with the Icasa Act or the underlying statutes[3] received by it. Second, it may make recommendations to Icasa necessary or incidental to Icasa's performance of its functions under the Icasa Act or the underlying

[2] No 13 of 2000
[3] In terms of s 1 of the Icasa Act, the underlying statutes are: the Broadcasting Act, No 4 of 1999; the Postal Services Act, No 124 of 1998; and the ECA.

statutes or achieving the objects of the Icasa Act and the underlying statutes. Section 17C sets out the procedures that the CCC must follow when it hears such matters. Section 17D provides as follows: the CCC must do the following: make a finding within 90 days from the date of conclusion of the hearing contemplated in s 17B; recommend to Icasa what action, if any, Icasa should take against a licensee; and submit those findings and recommendations and a record of the proceedings to Icasa for the action to be taken by Icasa.

14. In challenging the CCC's jurisdiction to consider Telkom's complaint at all, that is, in support of its general jurisdictional challenge, MTN contended as follows. First, Icasa's referral to the CCC had been made, according to a letter it sent to MTN, in terms of s 37(4)(c) of the ECA and not in terms of s 17B of the Icasa Act. Consequently, the Committee's powers as set out in the Icasa Act are irrelevant. Second, s 37(4)(c) of the ECA requires the CCC to resolve the dispute *in accordance with the procedure prescribed in terms of s 38*. However, the regulations made under s 38 do not prescribe any procedure for the CCC to resolve disputes referred to it in terms of s 37(4)(c). In the absence of an appropriate regulatory framework, the CCC has no power to resolve the dispute referred to it by Icasa.

15. MTN is correct that the CCC must determine whether or not it has

jurisdiction to resolve this dispute. However, in order for its contention that the CCC did not have jurisdiction to even entertain Telkom's complaint to be upheld, *both* the following propositions made on its behalf must also be upheld: the provisions of s 17B must be ignored; and as a result of the absence of a regulatory framework the CCC is precluded from considering the complaint. The validity of each of these propositions is considered in the paragraphs immediately hereunder.

16. In respect of its contention that the provisions s 17B of cannot be taken into account when the CCC determines the question of its general jurisdiction in respect of this dispute, MTN relies on the following matters, which incidentally are not in dispute: Icasa referred the dispute to the CCC in terms of s 37(4)(c) of the ECA; and, the letter from the CCC's Coordinator "confirmed" that Icasa's referral had not been made in terms of s 17B of the Icasa Act, but in terms of s 37(4)(c) of the ECA.

17. With respect, it does not follow that as a result of the foregoing no account may be taken of the provisions of the Icasa Act. It would be artificial to draw a veil between the ECA and the Icasa Act when determining the jurisdiction and powers of the CCC. In determining the ambit of its jurisdiction and powers the CCC is required to

consider all applicable statutory provisions. Whilst it may not stray beyond the ambit of its area of jurisdiction, it may not limit that area by adopting a blinkered approach, which would be the result were it to confine itself to the provisions of the ECA when determining its jurisdiction. However, even if all the findings made and conclusions reached above about whether or not the CCC may have regard to the Icasa Act for the purposes of determining its jurisdiction are wrong, for the reasons set out hereunder, even if one confines oneself to the jurisdiction conferred on the CCC by s 37 of the ECA, the CCC still has the jurisdiction to entertain Telkom's complaint.

18. First, Icasa was expressly entitled, in terms of s 37(4)(c) to refer the matter to the CCC. Second, on account of what is set out hereunder, I am of the view that the CCC is empowered to deal with the dispute notwithstanding the absence of a regulatory framework. I begin by stressing that the regulatory framework contemplated is confined to the *procedure* to be followed by the CCC. The CCC, being an organ of state is in the first instance subject to the provisions of s 33 of the Constitution, which upholds the right of everyone, including MTN, to administrative action that is lawful, reasonable and procedurally fair. To the extent that the Promotion of Administrative Justice Act[4] (PAJA) gives effect to the right to just administrative action, its applicable provisions would apply, in the absence of a procedural

[4] No 3 of 2000

regulatory framework. In any case, s 17C of the Icasa Act sets out the procedure that must be followed when the CCC holds hearings in terms of the Icasa Act. In my view, provided that the procedure we adopt is in principle similar to that set out in s 17C, there can be no suggestion of unlawfulness, unreasonableness or unfairness.

19. I did not understand MTN to suggest that the procedure adopted by the CCC in this case was unfair. It was its position that the absence of a regulatory framework in itself divested the CCC of any jurisdiction it may have to hear a matter referred to it in terms of s 37(4)(c). In my view, it would be placing form before substance to hold that because the body empowered to make Regulations had not done so the CCC did not have jurisdiction in respect of this dispute. The will of Parliament cannot be ignored in such a dismissive fashion. The CCC, as an organ of state, is obliged to fulfil its statutory obligations. It is required to resolve this dispute. It must do so, provided it acts lawfully, reasonably and procedurally fairly, as is required by s 33 of the Constitution.

20. In any case, it has been held, admittedly in an entirely different context, that the absence of regulations will not in itself serve to deny jurisdiction, where the enabling statute vests jurisdiction.[5]

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[5] Compare the principle underlying the decision in *Verstappen v Port Edward Town Board* 1994 (3) SA 569 (D).

21. In light of the foregoing, MTN's objection to the CCC's jurisdiction to hear the dispute is dismissed.

The specific jurisdictional challenge

22. It is necessary now to consider the more specific objection raised by MTN. It is this. Even if the CCC has jurisdiction to consider Telkom's complaint, it does not have the competence to determine the disputes relating to the call termination rates. The essence of the submissions made in support of that contention is set out in the paragraph immediately hereunder.

23. Telkom has asked that its dispute with MTN be resolved by Icasa's imposing or proposing a termination rate. However, neither the CCC nor Icasa has power to fix a rate. The reason is this. In terms of s 37(4)(a) and (b), Icasa may only impose terms that are consistent with Chapter 10 of the ECA. But s 41 empowers Icasa to establish only a *framework* of wholesale interconnection rates: it does not empower Icasa to *fix* interconnection rates. In addition, in terms of s 67(7)(h), Icasa may impose price controls, but only after following a prescribed process. Consequently, Telkom may not utilize s 37 to force MTN to accept its proposed termination rate. Moreover, Telkom

had projected that the 93c it intended levying would be for a period of five years. However, new Call Termination Regulations are to be made by Icasa. Consequently, any direction issued by the CCC in respect of call termination rates are likely to be in conflict with the rate set in those Regulations.

24. In assessing the merits of MTN's submissions, account must be taken of the fact that s 37 of the ECA envisages that parties may be in dispute about the terms and conditions contained in a proposed agreement. In this respect, the following must also be considered. First, there is no restriction on what the subject matter of those terms and conditions may be. Second, to allow Telkom to charge a higher rate for calls terminating on its network does not appear to result in any inconsistency with the provisions of Chapter 7 of the ECA. Third, neither the provisions of s 41 nor s 67(7)(h) appear to be of any application in this matter. Finally, the short answer to MTN's concern about a possible inconsistency between a decision of the CCC and the new regulations is this. Any relief granted to Telkom will be subject to consistency with the new Regulations. Consequently, if any inconsistency emerged between the rates prescribed by the CCC in this decision and those that will be set in the Regulations, the rates prescribed herein will endure only until the relevant provisions of the new regulations came into operation. To the extent necessary, that

will be laid down explicitly in the decision, if we should decide to fix a rate.

25. It follows from the foregoing that MTN's contention that the CCC does not have the jurisdiction to set out call termination rates that should be contained in the interconnection agreement falls to be rejected. I rule that the CCC has jurisdiction to hear the complaint and to grant such relief to Telkom as are within its powers, including fixing a termination rate, provided that on the information before us Telkom is entitled to such relief.

26. For reasons that emerge later in this decision, it must be stressed that MTN's objection to specific jurisdiction did not extend to the CCC's power to grant Telkom relief in respect of the bypass dispute.

Complaint about the proposed call termination rates

27. The way has now been cleared to consider the merits of Telkom's complaint and in particular whether it is entitled to the relief that it seeks.

28. Both parties accepted that, insofar as the merits of Telkom's complaint are concerned, it is necessary to determine what the ECA,

and in particular s 37 thereof, prescribes where there is a dispute between licensees[6] about the terms and conditions of an interconnection agreement. The provisions of s 37 have already been set out in full above and are not repeated here although reference thereto will be made frequently.

29. Telkom's submissions in support of its claim that it should be allowed to charge 93c a minute for calls which terminate on its network, whether such calls are commercial calls or CST calls, may be summarized as follows. Section 37(1) is clear: where licensee A (**A**) requests licensee B (**B**) to interconnect to it, **B** is obliged, subject to considerations of reasonableness, to interconnect to **A**. In terms of s 37(3), a request is reasonable where Icasa determines that the requested interconnection is: technically and financially feasible; and will promote the efficient use of electronic communications networks and services. MTN had only belatedly alleged that the request was unreasonable. In any case, the evidence that Telkom had tendered had not shown that (its) Telkom's request was unreasonable. Consequently, MTN was obliged to interconnect *on the terms and conditions* proposed by Telkom. In respect of call termination rates, Telkom should be allowed to charge 93c a minute for calls terminating on its network. In view of MTN's unwillingness to agree to the terms proposed by Telkom, the CCC should recommend to Icasa

[6] There is no dispute that both MTN and Telkom are licensees as defined in s 1 of the ECA.

that in terms of s 37(4)(a) Icasa imposes that termination rate as one of the terms of the interconnection agreement.

30. MTN's submissions may be summarized as follows. In terms of s 37(1), the duty to interconnect is only triggered where the request is not unreasonable. However, Telkom's request would be unreasonable if the requirements of s 37(3)(b) were not met. In the industry, the call termination rate in respect of commercial calls was 89c a minute and in the case of CST calls the termination rate was 6c. To require MTN to pay Telkom an asymmetrical termination rate of 93c would not promote the efficient use of electronic communications networks and services, as required by s 37(3)(b). Consequently, Telkom's request was unreasonable. As a result, s 37(1) was not triggered.

31. Before considering the validity of the respective submissions, it will be helpful to make the following general observations about interconnection disputes. First, they may arise before an interconnection agreement has been concluded between the parties. Or there may be an interconnection agreement, but a refusal by one of the parties thereto to interconnect. In both these cases, the provisions of s 37 of the ECA are applicable. Second, they may arise after an interconnection agreement has been concluded. In that case,

the provisions of s 40 of the ECA are applicable. It is common cause that a *final* interconnection agreement has not yet been concluded. Consequently, the provisions of s 37 are applicable.

32. With respect, s 37 is hardly a model of clarity. Be that as it may, it sets out the rights and obligations of both those who request interconnection and those to whom such a request is made. A careful study of the provisions of s 37 leads to the conclusion that it is intended to apply to two quite different types of situations.

33. First, where licensee A enters into an interconnection agreement with licensee B and requests interconnection with **B**. In such a case, unless **A**'s request is unreasonable, **B** is in terms of s 37(1) obliged to comply with the request. Where there is a dispute about the reasonableness of **A**'s request, Icasa will determine the matter in terms of s 37(3).

34. Second, where **A** requests **B** to enter into an interconnection agreement and **B** is unwilling or unable to negotiate or agree on the terms of the interconnection agreement. In this case, the provisions of s 37(4) are triggered. **A** may then notify Icasa which will adopt one of the three options set out in s 37(4). In the case of Telkom's complaint to Icasa, Icasa chose the third option: it referred the dispute to the

CCC.

35. That s 37(1) applies only where the parties in dispute have already entered into an agreement appears to be clear from the following. First, the obligation imposed by s 37(1) is to interconnect in accordance with an agreement *entered into between the parties*. Second, the provisions of s 37(6), which refers to *the interconnection agreement entered into by the parties in terms of s 37(1)* reinforces if indeed it does not confirm the conclusion that s 37(1) applies only where an agreement has already been concluded.

36. In the view I take of the matter, the provisions of s 37(1) are not of direct application in this case: the provisions of s 37(4) are applicable. Incidentally, in Telkom's notification of the dispute to Icasa dated 23 June 2010, it states that the notice was being given in terms of s 37(4). Icasa's response dated 22 July 2010 makes it clear that Icasa had accepted that the dispute had been lodged in terms of s 37(4). The significance of the foregoing is not to confirm the correctness of the interpretation of s 37 which has been set out above. Instead, it is this. Irrespective of the submissions made by the parties, including Telkom, about the relevance of s 37(1), the CCC is required to deal with the matter as a s 37(4) referral. In the circumstances, it is not necessary to consider what the position would have been, in respect

of the correctness of the referral, and obviously the CCC's competence to deal with the complaint, had the referral been made in terms of s 37(1).

37. In light of the foregoing findings, it is not necessary to make any express finding on whether or not Telkom's request for interconnection was reasonable. In fact, as I understand MTN's position, it did not contest the reasonableness of the *request* for interconnection. What it was not prepared to do was to interconnect on the terms proposed by Telkom in respect of what it would have to pay for calls terminating on Telkom's network and also allowing bypass, as proposed by Telkom. It considered interconnection *on those terms* to be unreasonable.

38. It is clear from what has been set out above that I am of the view that the test which Telkom relied upon, namely whether its request was unreasonable, is not the applicable test to determine whether it is entitled to the relief it seeks in respect of its proposed termination rates. The question then arises: what yardstick must be used to determine whether Telkom's claim for a call termination rate of 93c a minute should be granted.

39. It is clear that the ambit of the dispute about the terms of the

proposed interconnection agreement on this issue is quite narrow, being confined to whether Telkom should be allowed to charge MTN 93c a minute for calls, including CST calls, that terminate on Telkom's network, notwithstanding the following. First, in respect of commercial calls, MTN is prepared to pay 89c, which is the rate that MTN charges Vodacom and Cell C and proposes to charge Telkom to terminate calls on the MTN network. Second, in respect of CSTs,, MTN is prepared to pay 6 cents a minute, which is the rate MTN, Vodacom and Cell C charge one another. .

40. As I have already indicated, one of the grounds on which Telkom justified its right to the relief it claimed was that MTN's refusal to accede to the rates that it had requested was unreasonable. In support of its contention that MTN's refusal was unreasonable, Telkom relied in the main on the fact that it (Telkom) was a new entrant to the mobile electronic communications service market. As such, it contended, it was entitled to charge a higher rate. To this end, it pointed out that the validity of asymmetric rates was accepted internationally. One of the factors that is taken into account in determining whether asymmetry should be allowed in favour of a party is whether that party is a new entrant.

41. MTN did not dispute that a regulator could in principle allow

asymmetric rates. Its principal contention was that asymmetry was an exception and had to be justified by the party seeking it. It contended however that Telkom had not presented any evidence to justify why *it* (Telkom) was entitled to a higher rate than the industry norm. Telkom should not be able to rely simply on the fact that it was a new entrant. To the extent that Telkom alleged that as a new entrant it would incur greater costs, it had not provided any evidence in support of that allegation. Account should also be taken of Telkom's long association with Vodacom. In any case, even if it might technically be a new entrant in the mobile electronic communications service market, given its long history as a monopolist fixed line operator, the principles applicable to new operators were not strictly apposite when determining the validity of its request for a higher rate for calls terminating on its network.

42. Both parties presented extensive evidence in support of their respective contentions. A fair amount of evidence was given by experts. After considering the evidence tendered, I have come to the following conclusion. It is not necessary *for the purposes of this decision* to make any pronouncements on such evidence. This is because of the matters set out in the paragraphs immediately hereunder.

43. Telkom's request was not for general permission to charge asymmetric rates. Instead, it claimed that the termination rates that it had proposed be accepted by MTN. In my view, and in the light of the fact that its contentions in respect of the reasonableness test that it had relied on have been rejected, it was not sufficient for Telkom to provide a general justification for asymmetry. It was obliged to provide a justification for requiring that the rate be precisely 93c a minute. Even if all the contentions it makes for asymmetry are accepted, no case has been made out for a call termination rate of 93c a minute. For example, why should it not be 91c or even 90c. In my view, Telkom was required to furnish evidence which persuaded us that it was entitled to a rate of 93c a minute. This it failed to do.

44. I might mention that during the hearing Telkom's representatives were alerted to the following. First, the CCC members hearing the matter entertained doubts about the force of the "reasonableness" argument on which Telkom appeared to place great store. Second, it might be in Telkom's interest that it presented specific evidence relating to *its* position and in particular, having regard to the general matters it had raised in relation to its costs, why the specific rates it sought were justified by its actual costs.

45. It is not necessary to furnish further details on this matter. Suffice it to

say that following an exchange between the parties and the CCC members the following offer was made to the parties. We would be prepared to accept further information from Telkom, provided that MTN was given an opportunity to respond. After the hearing, there was an exchange of letters between the CCC and Telkom relating to this offer. Again, it is not necessary to give details here. However, it must be recorded that Telkom did not take up the offer. Consequently, the issue has been determined on the basis of the information that had been submitted before the hearing was finalised.

46. Having regard to that information, and taking into account the matters referred to above, including the submissions made by MTN, I have come to the conclusion that we would not be justified in resolving that the termination rates proposed by Telkom in respect of commercial calls be accepted.

47. In view of the fact that Telkom's proposal in respect of commercial call rates has not been accepted, there can be no basis for accepting its proposed termination rate in respect of CSTs. Indeed, having regard to the fact that MTN would suffer a loss in respect of such calls, it is surprising that Telkom persisted with that proposal. It too is not accepted.

The bypass dispute

48. It is time now to consider Telkom's other main complaint. The essence of the dispute is this. Should a restriction on interconnection bypass be included in the interconnection agreement between the parties.

49. MTN insists that the interconnection agreement contains a clause prohibiting bypass. Its proposed clause on this issue reads as follows:

> The parties undertake that it (sic) and any of its subsidiaries or any company wherein the parties has [sic] an interest shall not route its own or third party international inbound traffic through the use of any device or accept such interconnection by-pass traffic with a view to terminating the traffic onto the MTN Mobile Network other than through routes envisaged in this clause 3.

50. MTN's main contentions in support of its insistence that the clause be included in the interconnection agreement are as follows. First, because its contracts with other interconnection partners provide that the practice of interconnect bypass should be prevented, consistency required that such a clause be included in its contract with Telkom. Second, in light of the foregoing, the absence of the clause would be discriminatory and violate s 37(6) of the ECA. Third, in terms of

Regulation 5(1)(b) of the Interconnection Regulations[7] a request is *technically feasible*[8] if it allows *for interconnection to the interconnection seeker on terms that will not have a materially negative effect on the interconnection provider.* However, interconnection bypass will, indeed, have a "materially negative effect" on MTN. Fourth, MTN also refers to Regulation 13(1).

51. Telkom submits that if it accepted the clause proposed by MTN it could be a party to improperly regulating the market. It would not be party to a clause which is potentially anti-competitive. The question of quality, Telkom says, can be addressed by a contractual stipulation.

52. In determining whether to uphold Telkom's complaint, the following matters are of significance. First, because the request for by-pass has been made by Telkom, by-pass will not fall foul of s 37(6) of the ECA. Second, there is nothing in Regulation 13 that excludes bypass. Third, Regulation 6 provides that *the terms and conditions of each interconnection agreement may not preclude an interconnection provider or seeker from entering into different types of interconnection agreements with different interconnection seekers or providers.* Fourth, the question of the quality of service may, as suggested by Telkom, be addressed by an appropriate clause dealing with quality.

[7] Published in Government Notice R282 in GG 33101 of 9 April 2010.
[8] As contemplated in s 37(3) of the ECA

Fifth, Regulations 7 and 8 and 21(2) deal with the question of standards and service levels. Consequently, MTN may rely on their provisions to address its concerns.

53. In all the circumstance, it does not appear that there is a proper basis to insist on MTN's proposed clause. Telkom's complaint on this issue is accordingly upheld.

The status of a 'resolution' of the CCC

54. It is necessary now to consider a matter which was not pertinently raised during the hearing but must nevertheless be dealt with in this decision. It is this. When the CCC *resolves* a matter in terms of s 37(4)(c), what is the status of that *resolution*. The question arises for decision because the relief that Telkom sought is that the CCC must recommend to Icasa the steps that Icasa must take to deal with the dispute.

55. Fortunately, the answer appears to be quite straight-forward. It is to be found in s 40(3), which provides as follows:

> A decision by the [CCC] concerning any dispute or a decision concerning a dispute contemplated in section 37(4)(c) is, in all respects, effective and binding on the parties to the interconnection agreement unless an order of court of competent jurisdiction is granted against the decision.

56. Section 40(3) makes it clear that any decision taken by the CCC in this matter is binding on the parties until set aside. No recommendation needs to be made to Icasa: the "resolution" taken by the CCC has immediate effect.

57. However, neither s 40(3) nor any other provision of the ECA or indeed the Icasa Act furnishes an answer to the following question: are the CCC's powers under s 37(4)(c) greater than Icasa's powers under s 37(4)(a) or (b). It is worth recording that when mounting the general challenge to the CCC's jurisdiction to even entertain Telkom's complaint, MTN's counsel submitted that the CCC does not have greater powers than Icasa itself. Fortunately, it is not necessary, for the purposes of this decision, to determine the correctness of that submission. This is because, for the reasons set out in the paragraph hereunder, I have in any case determined that our decision should be consistent with the provisions of s 37(4)(b).

58. First, the tenor of s 37 appears to be to encourage the parties to a dispute to enter into interconnection agreements. Second, MTN is in principle not opposed to entering into an interconnection agreement with Telkom. Third, the dispute in respect of which Telkom has been successful is a rather narrow one. Fourth, Telkom has in any case

indicated that it is prepared to accommodate MTN's concerns about quality if there was no blanket prohibition on bypass. Accordingly, it would not be inappropriate to follow in broad terms what the legislature had proposed Icasa should do when determining such disputes.

59. Accordingly, in respect of the bypass dispute, I intend to make the following proposal. The interconnection agreement between the parties may not contain a clause prohibiting bypass. Notwithstanding the foregoing: the parties are required to negotiate to reach agreement on the quality of interconnection bypass and a clause agreeable to both parties may be included in the agreement. If the requisite negotiations do not produce a clause acceptable to both parties within seven days of the communication of this decision to the parties, the need for such a clause falls away and the rest of the draft agreement, save for the disputed termination rates will be binding on both parties.

Transmission of the decision

60. This matter was heard in terms of s 37(4)(c) of the ECA for resolution on an expedited basis. As pointed out earlier, no procedures have been prescribes in terms of s 38. In the circumstances, we consider

that the timelines set in s 17D(1) would at least be a useful guide. We had intended to transmit our decision to the parties within 90 days of the date of the hearing. That has not happened. There are two principal reasons. First, many of members of the CCC who heard this matter were away for the holiday period. As a result, we could not schedule meetings as intended. Second, Telkom had laid complaints against Vodacom and Cell C as well. The issues in the matters were similar. Those hearings were held much later than this (the MTN) hearing. In view of the fact that the same or at least very similar issues were being decided in all three matters, although based on different evidence and submissions, it was decided that all the decisions should be transmitted to the parties at the same time.

61. We accept that the parties have been inconvenienced. We tender our profound apologies to the parties for the dealy and the inconvenience caused.

62. However, without in any way suggesting that the delay is justified, it is necessary to record the following. After the matter was heard but before the decision was required to be handed down, the the Call Termination Regulations were promulgated – on 29 October 2010. As a result, there was no longer any urgency to determine the dispute over call termination rates. If Telkom's complaint had been upheld, it

would have been entitled to claim the difference between the rate it had demanded and the rate MTN was paying in terms of the interim agreement for the period between the date of the hearing and the date when the regulations became operative. In light of the fact that that complaint has not been upheld, no such claim arises.

Conclusion

63. On the information before us, MTN was prepared to enter an interconnection agreement with Telkom. However, it was not prepared to pay the call termination rate proposed by Telkom. And, it insisted that the interconnection agreement contained a clause prohibiting bypass or re-routing.

64. Telkom's complaint that MTN was not entitled to reject its proposal that MTN pay it 93c a minute for calls, whether commercial or CST, terminating on its network has not been upheld. It is not entitled to any relief in respect of this complaint.

65. However, its complaint in respect of MTN's insistence that the agreement include a clause prohibiting bypassing or re-routing has been upheld. I have already set out the nature of the relief to which it is entitled in respect of that complaint.

66. As a result of the foregoing, the dispute that Telkom referred to Icasa is resolved on the following basis:

1. Telkom and MTN are directed to conclude an interconnection agreement within seven days of this decision being transmitted to them.

2. The terms and conditions of the agreement shall be, save as set out in paragraphs 3, 4 and 5 hereunder, those set out in the draft agreement sent by Telkom to MTN on 23 July 2010 and which is referred to in Annexure "AM4" to Telkom's Founding Affidavit.

3. Notwithstanding paragraph 2 above, the call termination rates which shall be included in the agreement are those contained in the interim agreement concluded on 2 September 2010' save to the extent that that rate has been changed by the Call Termination Regulations which were published on 29 October 2010.

4. The interconnection agreement may not contain a clause prohibiting bypass.

5. Notwithstanding paragraph 4 above, Telkom and MTN are required to negotiate to reach agreement on a clause on the quality of interconnection bypass and a clause agreeable to both parties may be included in the agreement. If the negotiations do not produce a clause acceptable to both parties within seven days of the communication of this decision to the parties, the need for such a clause will fall away and the draft agreement referred to will be binding on both parties.

V Soni SC

Acting Chairperson

Prof. JCW van Rooyen

Name: I agree

Zolile Ntukwana

Name: I agree

Jack Tlokana

Name: I agree

Tumeka Ramuedzisi

Name: I agree