COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 7 September 2018 **Case** Number**:** 276/2018

Telkom SA (SOC) LTD **COMPLAINANT**
v
VODACOM PTY LTD **RESPONDENT**

PANEL:

JCW van Rooyen SC (Chairperson)
Ms Dimakatso Gocha
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Mr Jack Tlokana

For the Complainant: Craig Watt-Pringle SC and with him adv Benny Makola instructed by Werksmans Attorneys Johannesburg and Sandton
For the Respondent: Terry Motau SC and with him adv Lebogang Kutumela instructed by Cliffe Dekker Hofmeyr Johannesburg
Acting Coordinator: Attorney Meera Lalla
Coordinator: Ms Lindisa Mabulu

JUDGMENT ON JURISDICTION

JCW VAN ROOYEN SC

BACKGROUND

[1] Telkom SA (Soc) Ltd ("Telkom") has, inter alia, ducts, manholes and related infrastructure in which it has installed its cables for providing electronic communications services in the following residential estates: La Brie Estate

[1] An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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. The present matter only deals with the preliminary issue of jurisdiction: was there a duty which a licensee allegedly did not abide by?

(situated at Rietvalleirand, Gauteng), De Oude Waterkloof Estate (situated at Rietvalleirand, Gauteng) and Villieria Estate (situated at Villieria, Gauteng). Telkom Attorneys, Werksmans, on 7 September 2017 filed a complaint in terms of section 17C of the ICASA Act with the Coordinator of the CCC that Vodacom (Pty) Ltd had, unbeknown to Telkom, made use of these ducts for its own installations without concluding a lease with Telkom, as required by section 43 of the Electronic Communications Act 2005 ("ECA").

[2]Section 43 of the ECA provides as follows:
(1)Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities 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 electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

[3]As mentioned, the Complaint was initially, filed on 7 September 2017 in terms of section 17C of the ICASA Act. The prescribed procedure of Answer and Reply was followed by the Office of the Coordinator. At the stage when the matter was placed before me (as Chairperson) in 2018 so as to refer it to the Complaints and Compliance Committee, I noted that I was not authorised in terms of section 17C of the ICASA Act to do this. The reason being that section 17C exclusively deals with matters which are referred by the *Authority* to the CCC. A complaint, in this case, should have been filed by Telkom's attorneys directly with the CCC in terms of section 17B of the ICASA Act or have been referred to the CCC in terms of section 17C by the Authority, if it had been launched with the Authority and the Authority had so decided.

[4] In February 2018 Telkom amended its complaint by stating that it had been in error to have filed the complaint in terms of section 17C and that its original complaint was amended by amending 17C to 17B, wherever this section 17C appeared in the September 2017 Complaint. There was no reason not to record the complaint, which now, effectively, referred to section 17B.

[5]The Coordinator of the CCC then wrote a letter to Werksmans Attorneys, acting for Telkom:
The letter stated that the Chairperson had made a ruling on 25 October 2017 that the complaint should, whilst section 17C was being referred to, have been lodged with the Authority and not the CCC in terms of section 17C of the ICASA Act.
The letter continues as follows:

4. We have duly considered Telkom's letter substituting its initial complaint and now lodging it under section 17B of the ICASA Act instead. We request Telkom to note the following: That

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;

5. Section 17B cannot be read in isolation. It must be linked to the relief that Telkom is seeking under section 43 of the ECA read with Regulation 3 of the Facilities Leasing Regulations 2010.

6. Section 43 of the ECA deals with electronic facilities leasing, and from the correspondence before us, we have noted that there are no facilities leasing agreement that exists between Telkom and Vodacom.

7. We have further noted that a formal letter of demand was addressed by Telkom to Vodacom on 28 July 2017, citing the *Dennegeur* case which was decided by the Western Cape Division of the High Court. In this case the High Court made its order subject to the outcome of the section 43 proceedings before ICASA.

8. The CCC would be acting beyond its powers to investigate a complaint in which the relief Telkom is seeking is for the Committee to interdict the Respondent. The CCC does not have the authority to interdict Vodacom utilizing Telkom's infrastructure without a prior request and agreement with the Complainant.

Thus, in the circumstances, we advise Telkom to approach the Authority in terms of section 43 to ensure that parties reach an agreement in line with the obligations under the aforementioned section – "to lease electronic communications facilities".

We therefore resolve that it would be inconceivable of the CCC to investigate a complaint under section 17B of the ICASA Act without the section 43 of the ECA procedure not being followed by both parties.

Signed by the Coordinator of the CCC

[6] The above letter was replied to by Telkom's Attorneys (Werksmans) on 5 March 2018. Several aspects were raised and it was argued that the CCC does, after the amendment of the Complaint to section *17B(a)*, have jurisdiction in terms of section 17B to consider the complaint. The following is added:

"In addition to the above issues, it does not appear that the CCC Coordinator has the authority to decide, on behalf of the CCC, whether or not to deal with a complaint. In the circumstances, it is our respectful view that no decision binding on the CCC has been made.

Accordingly, and against the above background, our client requests the CCC to reconsider its view to the complaint.

Vodacom was copied with this letter for the attention of Mr Thamsanqa Kekana who, from its Legal Division, was dealing with the matter.

[7] After further correspondence, I issued the following Procedural Ruling on 11 June 2018:

(a) That Telkom provides the CCC with full written legal argument as to whether its complaint in terms of section 17B, with reference to section 43 of the ECA and/or the licence conditions of Vodacom, falls within the jurisdiction of the CCC. This argument must be filed with the Coordinator of the CCC before 16:00 on 22 June 2018.

(b) That Vodacom be provided with this legal argument on jurisdiction by the Coordinator of the CCC and that Vodacom responds to it on or before 16:00 on the 6th July 2018 by filing legal argument on jurisdiction with the Coordinator of the CCC.

(c) That Telkom be afforded an opportunity to reply to Vodacom's legal argument as to jurisdiction on or before 16:00 on 16 July.

[8] Once the said argument was filed, a hearing of the parties in this matter was held on the 7th September 2018, with senior counsel on both sides.

FUNCTUS OFFICIO

[9] Mr *Motau,* acting for Vodacom*,* limited his oral argument at the hearing of this matter to the point that the CCC was *functus officio* after the 2nd February 2018 letter of the CCC Coordinator had been sent to the parties. See paragraph [5] above. This view was opposed by Mr *Watt-Pringle*, acting for Telkom. He further argued that it could never have been the intention of the Legislature to not place a duty on a licensee to pay rent for the use of the Telkom ducts.

[10] The general rule is that once a decision has been taken by an administrative body, it cannot (in the ordinary course) be withdrawn. This is known as the *functus officio* rule. In *Retail Motor Industry Organisation & Another v Minister of Water & Environmenttal Affairs and Another* 2014(3) SA 251(SCA), the Supreme Court of Appeal, in this regard, stated as follows per Plaskett AJA:

[22] The first point that was argued was that the minister was not able to withdraw the July plan once she had approved it because she was *functus officio*. This argument, it seems to me, strikes something of a disconsonant note because the minister, by withdrawing the July plan, gave RMI and Circuit Fitment precisely what they wanted.

[23] In explaining what the *functus officio* principle means, Daniel Malan Pretorius says the following:

'The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter . . . The result is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'

[24] The *functus officio* principle is also intended to foster certainty and fairness in the administrative process. It is not absolute, in the sense that it does not apply to every type of administrative action. Certainty and fairness have to be balanced against the equally

important practical consideration that requires the reassessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest. Lawrence Baxter deals with these competing factors when he explains the purpose of the principle:

'Indeed, effective daily administration is inconceivable without the continuous exercise and re-exercise of statutory powers and the reversal of decisions previously made. On the other hand, where the interests of private individuals are affected we are entitled to rely upon decisions of public authorities and intolerable uncertainty would result if these could be reversed at any moment. Thus when an administrative official has made a decision which bears directly upon an individual's interests, it is said that the decision-maker has discharged his office or is *functus officio.*'

[25] It is not necessary in this judgment to define the exact boundaries of the *functus officio* principle, save to say the following: *first, the principle applies only to final decisions;* secondly, it usually applies where rights or benefits have been granted — and thus when it would be unfair to deprive a person of an entitlement that has already vested; ….” (footnotes omitted and accent added in paragraph 25 of the judgment)

RULING

[11] The answer to the *functus officio* argument is that the CCC could only be held to have been *functus officio* if the matter had been considered by it before the hearing and it had taken a decision not to hear the matter in terms of section 17B of the ICASA Act. This was, however, not the case. The decision of the Coordinator does not amount to a decision of the CCC. The CCC’s decisions may only be taken in terms of section 17B or 17C of the ICASA Act.

Thus, only now, for the first time, the CCC has to decide whether the complaint falls within its jurisdiction. And this, after having heard Senior Counsel from both sides on the 7th September 2018.

JURISDICTION

[12] As a starting point section 43(1)-(4) of the ECA is relevant:

43. Obligation to lease electronic communications facilities

(1) Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities 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 electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic

communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.

(3) 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.

(4) For purposes of subsection (1), a request is reasonable where the Authority determines that the requested lease of electronic communications facilities -

(a) is technically and economically feasible; and

(b) will promote the efficient use of electronic communication networks and services.

……

[13] The core question is whether the licensed provider (Vodacom in the present matter) would be free to simply use the duct for its contact to its customers without obtaining permission from the provider, which established the duct. In other words, Vodacom would be free not to conclude a lease. This simply cannot be the law. Such an interpretation would give free reigns to licensees to take the law into their own hands. The situation would amount to nothing else than a "free for all", which could never have been the intention of the Legislature. Ngcobo J stated as follows in *Masetlha v President of the Republic of South Africa and Another* 2008(1) SA 566(CC) at [92]:

[192] This court has adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands. In addition, such implication must be necessary in order to 'realise the ostensible legislative intention or to make the [legislation] workable.
Similarly, where the surrounding circumstances point to the fact that words were deliberately omitted or if the implication would be inconsistent with the provisions of the Constitution or the statute, words cannot be implied. To this must of course be added the settled principle of constitutional construction which is this: where a statute is capable of more than one reasonable construction, with the one construction leading to constitutional invalidity, while the other [does] not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained. (footnotes omitted)[2]

[2] Also see *Cool Ideas 1186 CC* v *Hubbard and Ano* 2014(4) SA 474(CC) at para [28] where Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring) stated as follows:

The CCC has no doubt that a construction of section 43(1) which allows a licensee free reign over the duct of another licensee would be absurd and in conflict with the obvious intention of the Legislature – that a lease must be requested. The alternative to a lease cannot be a situation where the (intervening) licensee is permitted to take the law into its own hands: open the duct and make use of the facility without consent by the licensee who created that duct. In fact, section 43 of the ECA protects the right of the licensee who made the duct - albeit on the property of the homeowners by implicitly requiring a lease in *all* cases where entry is sought.

It would indeed make no sense to open the choice to a licensee seeking interconnection to not apply to a licensee to lease the facility. That would be giving license to unlawfulness. Which could never have been the intention of the legislature. It would also amount to an absurdity to require from a licensee that it grant access to its duct on request and then, simply, have to live with the unlawful alternative: for a competitor simply to use the facility that it has established.

Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning

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[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, A that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a). (Footnotes omitted)

is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

Thus, the matter must be approached holistically, and context and language must be considered together, with neither predominating over the other.Also see *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) 10–12.

(5)The electronic communications facilities leasing regulations may include a framework for the exemption (in whole or in part) of electronic communications network service licensees that have less than 25% market share from the ***obligation*** to lease electronic communications facilities in terms of section 43(1).

[13] The answer is, accordingly, that Vodacom had a duty to conclude a lease with Telkom for the use of the Telkom duct or, at least, should have requested its permission. The point *in limine* is decided in favour of Telkom.

[14] It was agreed at the hearing of this matter that the hearing would resume once this point has been decided. Telkom is required to file a founding affidavit as to what it demands from Vodacom in light of this judgment. This would be followed by an Answering Affidavit by Vodacom and a Replying Affidavit by Telkom. The time lines will be set as soon as this judgment is issued and the Chairperson has decided, in accordance with the CCC Regulations, that the matter will be dealt with as a matter of urgency.

The Chairperson will decide on the time frames in accordance with which the affidavits must be filed.

JCW van Rooyen

The Members concurred in this judgment.