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**TO : COUNCIL**

**FROM : LINDISA MABULU; CCC COORDINATOR**

**DATE : 24 NOVEMBER 2010**

**SUBJECT : FOR NOTING BY COUNCIL – THINTA THINTA TELECOMMUNICATIONS (PTY) LTD V TELKOM SA LIMITED**

Dear Councillors

The ruling of the Complaints and Compliance Committee (CCC) in the matter between Thinta Thinta Telecommunications (Pty) Ltd case number 38/2010 concluded on 03 November 2010 is for noting by Council.

No recommendation is made to Council in so far as the sanction is concerned and Council may retain the ruling for their records.

Yours Sincerely

  
**Lindisa Mabulu**  
CCC: Coordinator  
Legal and CCC Division

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Dates of meeting: 22 September 2010  
and 3 November 2010

Case number: 32/ 2010

**THINTA THINTA TELECOMMUNICATIONS (PTY)LTD**

**COMPLAINANT**

**vs**

**TELKOM SA LIMITED**

**RESPONDENT**

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## Complaints and Compliance Committee

**De Villiers J ( Acting Chairperson)**

**N Ntanjana**

**Z Ntukwana**

**J Tlokana**

**JCW van Rooyen SC**

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## JUDGMENT

**De Villiers, Judge**

1. On or about 8 December 2009 the complainant ("Thinta") lodged an application against Telkom SA Ltd ("Telkom") with the CCC in terms of s40 of the Electronic Communications Act, No 36 of 2005 ("ECA").
2. It appears that Thinta and Telkom concluded an interconnection agreement ("the agreement") during 2006. In terms of the agreement Telkom is obliged to provide Thinta with access to the agreed number of ports, (also referred to as "voice channels"). In terms of clause 4.6 of the agreement Telkom is obliged to "maintain and be responsible in all respects, for whatever apparatus and equipment is necessary to ensure the conveyance of Calls within and between its Telecommunication System and Points of Interconnection". In terms of

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<sup>1</sup> Established in terms of s 17A of the ICASA Act 13 of 2000 as amended

clause 4.13 of the agreement Telkom "shall not make or permit to be made any alteration, adjustment or addition to any Points of Interconnection or any element of its Telecommunication System in such a way as to adversely affect or impair the conveyance of signals pursuant to Interconnection" and "undertakes to take whatever steps are reasonably necessary to minimise service failures and congestion and signalling disturbances which would affect the ability (Thinta) to convey Calls across its Telecommunication System".

3. Since March 2009 Thinta has been forwarding Calls to Telkom's Telecommunication System for onward termination to the Telecommunication System of Econet Wireless (Private) Limited (Zimbabwe) ("Econet"), a telecommunications company operating in Zimbabwe.
4. There is a total of 480 ports (or voice channels) between Thinta's and Telkom's respective Telecommunication Systems.
5. Thinta avers in its affidavit of 8 December 2009 that on Friday, 20 November 2009, its calls on the route to Zimbabwe "were inexplicably, either intentionally or negligently, blocked by Telkom. When Telkom was contacted regarding the problem being experienced, Thinta was informed that a Telkom representative had closed the route to Zimbabwe without any reason....The route was initially down from 17h05 on 20<sup>th</sup> November 2009 and went live again at 08h01 on Monday 23 November".
6. On 9 December 2009 Ms Lindisa Mabulu, the Coordinator of the CCC, forwarded Thinta's complaint to Ms Refiloe Msiza, Executive: Corporate Compliance, Legal Services at Telkom, requesting Telkom to respond to all the allegations in Thinta's affidavit of 8 December 2009 and requiring Telkom to file its answering affidavit within five business days from the receipt of the CCC's letter.
7. On 15 January 2010 Ms Msiza by a letter addressed to the Chairperson of the CCC, responded to Thinta's complaint. It is to be noted that although Ms Mabulu had required an answering affidavit to be filed by Telkom, Ms Msiza merely provided Telkom's response by means of a letter. One would have expected Telkom to have provided the CCC with an answering affidavit, together with supporting affidavits of persons who have personal knowledge of the facts. Unfortunately this was not done. As will appear below, this lapse has caused

problems to the CCC in deciding the matter. These problems have been exacerbated by the fact that the parties have agreed, on the proposal of Thinta's attorneys, that the CCC is requested to make a ruling based on the papers before it. The CCC, nevertheless, decided the matter on the papers before it.

8. In Telkom's said letter of 15 January 2010 it conceded that on Friday, 20<sup>th</sup> November 2009 at 17h05 Thinta's calls on the route to Zimbabwe were blocked and were only unblocked on Monday, 23<sup>rd</sup> November 2009. It is stated that the aforesaid calls were blocked by one of Telkom's employees, namely Rod Rodrigues ("Rod") who did so upon receipt of an email from one Malvin Meyer, the Group Managing Executive of Econet, who had requested that all Thinta's calls (Zim Econet traffic with CL1+2711257300) be blocked. A copy of the said email is annexed as annexure "T1". Ms Msiza's letter adds: "In blocking the calls the said Rod was acting without Telkom's authority or instructions and the blocking was corrected as soon as Telkom became aware of it. All staff were instructed not to react to such external requests."
9. Telkom's said letter of 15 January 2010 does not reply to Thinta's deponent's averment in par 16 of their founding affidavit that "when Telkom was contacted regarding the problem (of blocking) being experienced, the Complainant was informed that a Telkom representative had closed the route to Zimbabwe without any reason".
10. Annexure "T1" to Telkom's said letter is an email, dated 19 November 2009 from Malvin Meyer, to Rod on the subject of "Zim Econet Traffic". Meyer describes himself in the email as "Group Managing Executive Liquid Telecommunications Limited". It may be that Meyer is also the Group Managing Executive of Econet, as Telkom's letter avers, since it seems from his email as if he is also speaking on behalf of Econet. Meyer complains in his mail about Thinta which "sends this bad quality traffic destined for our network via Telkom". Meyer asks: "why can you not just block all Zim Econet traffic with this CLI as they are causing numerous customer complaints". He concludes by saying: "This is irregular and should not be tolerated by Telkom as it could lead to serious consequences, both for us and Telkom and it should be avoided at all costs".
11. On the probabilities, Rod is, like Meyer, also in an executive position at Telkom, otherwise Meyer would not have addressed an email of this nature to him, nor

would Meyer have considered that Rod was in a position to "just block" Thinta's calls, as he requested Rod to do. The mere fact that Rod "was acting without Telkom's authority or instructions" in blocking the calls certainly does not, in my view, mean that Rod was acting beyond the course of his employment when he blocked the calls, or that he was "on a frolic of his own", as suggested by Ms Msiza on Telkom's behalf in her letter to Ms Mabulu, dated 14 June 2010. Nor can it be said, as Ms Msiza stated in her said letter that Rod blocked Thinta's calls "on instructions of Mr Meyer". Meyer was obviously not in a position to give instructions to Rod, nor, on a proper interpretation of Meyer's email, can it be said that he was "instructing" Rod to block the calls. He was merely suggesting to Rod that he should block the calls. It is unfortunate that we have not been provided with an affidavit from Rod himself, or from anyone else in the Telkom hierarchy. In the absence of such affidavits, and on the basis of what I have said above, I consider that Rod acted in the course of his employment when he blocked the calls. Accordingly, when Rod acted, his act must also be regarded as being Telkom's act.

12. The above findings are supported, in my view, by the following: On 24 November 2009 Mr Pierce of Phukubje Pierce Masithela Attorneys sent an email to Mr Gert Postma, a Senior Legal Advisor of Telkom, stating that he had been advised by his client (Thinta) "that during the past few days, the connection on the route to Zimbabwe has been interrupted regularly. As you are no doubt aware, this causes my client considerable economic loss and reputational harm....I await your urgent response regarding the abovementioned interruptions and look forward to hearing from you before the end of the day". On 26 November 2009 Postma replied by email that "Telkom has no knowledge concerning any economic loss or reputational harm potentially or allegedly suffered by your client. All of Telkom's rights are reserved. We have now been advised that Telkom has not unduly interfered with the route to Zimbabwe".
13. It seems rather cynical for Postma to state that Telkom has not "unduly interfered" with the route to Zimbabwe, especially if one takes into account that Telkom has subsequently conceded in its letter of 15 January 2010 that Thinta's calls were indeed blocked between 20 to 23 November 2009. However, of greater importance is that Postma clearly accepted that Telkom had interfered on the route to Zimbabwe, although not unduly. There was certainly no mention at that stage that one of Telkom's employees had acted without Telkom's authority

or instructions, or on a frolic of his own in blocking Thinta's calls. Such averments accordingly appear to be an afterthought.

14. Thinta's further complaint in par 17 of its affidavit is that since 23 November 2009 the route to Econet's network in Zimbabwe has been very unstable and unreliable. The number of ports available to it and which it regularly had use of dropped from 450 to 30 from 21 November 2009.
15. In reply hereto, Ms Msiza's letter of 15 January 2010 states in par 2 thereof, that Telkom has established that, although the number of ports available to Thinta has not been reduced below 480, the conveyance of Thinta's calls has been adversely affected due to the software settings on the network, but that this situation was rectified on Thursday, 14 January 2010 and that the service has been restored to the same level of technical standard and quality as existed prior to 20 November 2009.
16. No explanation is given by Ms Msiza how it came about that the software settings on the networks adversely affected the conveyance of Thinta's calls. Furthermore, no explanation is given why it took Telkom approximately 7 weeks to rectify the situation after Thinta's complaint had been made on 24 November 2009.
17. In my view, Telkom has breached the provisions of paragraphs 4.6 and 4.13 of the Interconnection Agreement, quoted above. As far as par 4.6 is concerned, I am of the view that by blocking the calls Telkom has not maintained the apparatus and equipment to ensure conveyance of Thinta's calls. As far as par 4.13 is concerned Telkom blocked Thinta's calls and thereby adversely affected or impaired the operation of Thinta's Telecommunication System or impaired conveyance of Signals. Further, Telkom did not take whatever steps were reasonably necessary to minimise service failures and congestion and signalling disturbances which would affect Thinta's ability to convey calls across its Telecommunication System.
18. S40(1) of the ECA provides that a dispute arising under an interconnection agreement must be resolved on an expedited basis by the CCC in accordance with the regulations prescribed by the Authority. In the Afrikaans text the word "resolve" is rendered by the word "besleg". The Shorter Oxford English

Dictionary provides the following relevant meaning of the word "resolve": "to decide, determine, settle (a doubtful point)".

19. From the evidence before the Committee it is clear that the breach of paragraphs 4.6 and 4.13 of the Interconnection Agreement was put to an end by Telkom. According to section 40 of the Electronic Communications Act the dispute between the parties to an interconnection agreement must be "resolved" by the CCC. The CCC will resolve this matter by making what is, in effect, a declaratory order that there had been a breach. Thinta requests the CCC to order Telkom to desist from further breaches of the agreement. There is no sense in such an order since future similar breaches would, in any case, be prohibited by the agreement as interpreted by the CCC. The CCC cannot, as would a Court of Law, make an order that future breaches would be regarded as contempt of an order by the CCC and then hear an application by Thinta for contempt. Accordingly, the furthest that that the CCC can go in a matter such as this one is to make a declaratory order that conduct as described above amounts to breach in the past. Thereby the CCC has "resolved" the matter. Of course, if the breach was continuing at this stage, the CCC would have resolved the matter by ordering Telkom to desist from further breach of the agreement.
- 20 Finally, something should be said about s40(1) of the ECA's requirement of resolution "on an expedited basis". The last written response of Telkom took place on 14 June 2010. I assume that the reason why the matter was not brought before the CCC on an expedited basis was that the urgency contained in Thinta's complaint of 8 December 2009 was, in large measure, removed by the fact that the situation had been rectified on 14 January 2010 and that the service had been restored to the same level of technical standard and quality as had existed prior to 20 November 2009. (See the last sentence of par 2 of Ms Msiza's letter to the chairperson of the CC on 15 January 2010), which was not disputed by Thinta's attorney in his reply to Telkom's said letter, dated 10 February 2010).
21. It is declared that Telkom has breached paragraphs 4.6 and 4.13 of the Interconnection Agreement between the parties.
22. Furthermore, Thinta avers in par 27 of its affidavit that Telkom operates a similar service to that which it affords to Thinta, through its Telkom Retail division. It

avers that it is unlikely that Telkom Retail is suffering similar problems to Thinta's and that this clearly contravenes s67(1) of the ECA in that it is resulting in undue discrimination against Thinta and is lessening competition in that market. Thinta avers in par 28 of its affidavit that Telkom, as a licensee, is clearly contravening s37(6) of the ECA in that it is providing Thinta with a service of a "lower technical standard and quality than the technical standard and quality provided by such licensee to itself or an affiliate".

23. In reply hereto, Ms Msiza in par 3 of her letter of 15 January 2010 states that Telkom does not discriminate against Thinta as far as interconnection is concerned and does not treat Thinta less favourably both in general and in particular as far as the conveyance of its calls are concerned than it treats other licensed providers in particular the Telkom Retail.
24. Ms Msiza's reply may possibly be regarded as a bare denial since no facts are averred to substantiate the denial. One may ask whether other licensed providers, in particular Telkom Retail, experienced similar problems to those experienced by Thinta and, if so, whether it also took approximately seven weeks to resolve such problems.
25. On the other hand, one must certainly take into account that Thinta's deponent avers in par 27 of his affidavit that "it is unlikely that Telkom Retail is suffering similar problems to the Complainant". In par 28 the deponent states that "Complainant is of the view that the service levels of Telkom Retail are not being affected by Telkom's actions in the same way that Telkom's actions are affecting the Complainant". In other words, the deponent is arguing the probabilities of the matter in the passage quoted from par 27, while in par 28, in the passage quoted the deponent's "view" is really a submission on the facts. The deponent has, therefore, not laid a sufficient factual basis for his averments. However, the matter requires further investigation by the CCC.
26. The matter raised in terms of section 67(1) of the ECA is a matter separate from the dispute which the CCC resolved in paragraph 21 hereof. It amounts to a complaint which should in the normal course be dealt with by the CCC in terms of sections 17B-E of the ICASA Act. The complaint falls in the category of complaints received by the CCC in terms of section 17B(a)(ii). According to section 17B(a) the CCC "must investigate, and hear if appropriate, and make a



finding on..." such a complaint received by it. What is lacking in the present matter is, however, an investigation by an inspector in terms of section 17F(5)(e). Such an inspector may be called upon by the CCC to appear before it in terms of section 17F(5)(f). The CCC hereby requests an inspector in terms of the said subsection to appear before it and report on his or her investigation of the complaint that the facts set out above amounted to a contravention of section 67(1) of the Electronic Communications Act. The date set will be in the second half of February 2011 and a written report must be filed with the Co-ordinator of the CCC by 11 February 2011. The Co-ordinator is requested to refer this judgment, with specific reference to this paragraph 26, to the General Manager of the relevant Division and copy the Senior Manager Regional Divisions with the same materials. The papers in the matter must also be included by the Co-ordinator. The Co-ordinator is requested to keep the Acting Chairperson in this matter informed as to the steps taken. If the relevant Division does not, as a result of organisational reasons, have an inspector in its ranks, it would be in order if the General Manager (e.g. Markets and Competition) files the report.

27. The Applicant also raised a complaint in terms of section 37(6) of the ECA. Once again, based on alleged unfair competition. However, that subsection sets the requirements for an agreement and does not, in itself, create an additional obligation not discriminate unfairly. The agreement does not, in itself, fall foul of section 37(6) and was, indeed, found to have been in accordance with the ECA by the Authority in terms of section 39 of the ECA.

28 In the result we make the following declaratory order: Telkom has breached paragraphs 4.6 and 4.13 of the interconnection agreement. The breach has, however, been remedied. Furthermore, the matter raised in paragraph 26 is referred for investigation, as set out in paragraph 26. On receipt of that report, this panel of the CCC will consider whether to hear the matter in terms of section 17B(a)(ii) of the ICASA Act.



**IWB de Villiers**

Acting Chairperson of the CCC

The Members agreed with the judgment of the Acting Chairperson

**24 November 2010**