



Independent Communications Authority of South Africa

Pinmill Farm, 164 Katherine Street, Sandton
Private Bag X10002, Sandton, 2146

Office of the Chairperson
Tel: +27 11 566 3007
Fax: +27 11 566 3008
Email: chairperson@icasa.org.za

Ref No: 17/3/3/1/4-2018

Motsoeneng Bill Attorneys Inc

Attorneys for Transnet (SOC) Ltd
20 Woodlands Drive
Building 18, The Woodlands Office Park
Sandton

PER EMAIL: michael@mbaincorporated.co.za

Werksmans Attorneys

Attorneys for Mobile Telephone Networks (Pty) Ltd
The Central, 96 Rivonia Road
Sandton

PER EMAIL: CManaka@werksmans.com

Dear Mr. Bill Motsoeneng and Mr. Corlett Manaka

**TRANSNET (SOC)LTD VERSUS MOBILE TELEPHONE NETWORKS (PTY) LTD
CASE NUMBER: 282/2018**

The above matter has reference.

This is to advise the parties in the matter between Transnet (SOC) Ltd and MTN (Pty) Ltd that on Thursday, 26 April 2018, the Council of the Independent Communications Authority of South Africa approved the recommendation of the Complaints and Compliance Committee.

1. The matter related to Transnet lodging a complaint with the CCC against MTN, alleging that MTN Contravened section 4(9) of the Number Portability Regulations as promulgated in 2005 due to its failure to port approximately 12 000 mobile numbers to Vodacom's network.
2. The CCC held hearings on 19 March 2018 to hear arguments from disputing parties regarding the merits of the case.
3. On 25 April 2018, the CCC tabled its recommendations to the Council of ICASA for ratification in terms of section 17D of the ICASA Act no.13 of 2000.
4. The Council of ICASA, in terms of section 17E of the ICASA Act approved the recommendations of the CCC in its entirety as expressed hereunder:
 - 4.1. That MTN must port the required numbers to Vodacom within seven days from when the order is issued by the Council of ICASA.
 - 4.2. That the seven days be calculated without inclusion of the day on which this order is issued.
 - 4.3. "Day" means a calendar day running from the day after the issue of the judgment until midnight of the seventh day.

The judgment as issued by the Office of the CCC on 26 April 2018 is applicable and is attached hereto and marked Annexure "A" for ease of reference.

Yours Sincerely,



Rubben Mohlaloga
Chairperson

Date: 03/05 /2018

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 19 MARCH 2018

Case Number: 282/2018

TRANSNET (SOC) LTD

COMPLAINANT

v

MOBILE TELEPHONE NETWORKS (Pty) LTD

RESPONDENT

PANEL: Prof JCW van Rooyen SC (Chairperson)
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr. Mzimkulu Malunga
Mr. Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

For the Complainant: Paul Kennedy SC with him Adv Tebogo Manchu instructed by Motsoeneng Bill Attorneys Inc, Sandton

For the Respondent: Advocate Terry Motau SC with him Advocate Lebogang Kutumela instructed by Werksmans Attorneys, Sandton

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

INTRODUCTION

[1] This is an urgent² complaint by Transnet (SOC) Ltd ("Transnet") against Mobile Telephone Networks (Pty) Ltd ("MTN"). It is common cause that MTN

¹ An Independent Administrative Tribunal at the Independent Communications Authority (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.

² The Chair of the CCC, when the complaint was lodged, decided on a preliminary basis that it be regarded as urgent and that the ordinary terms for Response and Reply would be shortened. The

had concluded a mobile phone contract with Transnet and had delivered services thereunder for several years. When the contract was advertised for renewal, MTN was removed from the bid since it had not filled in the application form, according to Transnet, as required. The matter was referred to an Ombudsman who agreed that MTN had justifiably been removed from the bid. The contract was granted to Vodacom Pty Ltd (“Vodacom”). MTN refused to port the numbers at the request of Transnet and also of Vodacom. More or less 12000 numbers are involved.

[2] Thereafter a complaint was filed with the Complaints and Compliance Committee, which has jurisdiction to deal with complaints concerning omissions to comply with the relevant licence conditions, including omissions to comply with Regulations applicable to licensees. Transnet argued at the hearing of this matter that the contract had been cancelled validly, while MTN denied this, requiring a calendar month notice. It, accordingly, stated in its defence that it had no duty to port the more or less 12000 numbers.

[3] As background it should be mentioned that MTN has applied for a review of the decision not to renew its contract and the matter is set down for a High Court hearing in June 2018. At the hearing of this complaint on the 19th March the CCC was informed that MTN had also filed an urgent application with the High Court to uphold the contract with MTN until the outcome of the review application. On 22 March the CCC was informed that the High Court application had been struck from the roll.

THE MERITS OF THE COMPLAINT BY TRANSNET

[4] It was common cause that a contract had been concluded between Transnet and Vodacom and that, in spite of Vodacom’s notice to MTN requiring the porting of numbers in accordance with ICASA Regulations, MTN’s approach has been and still is, that its contract had not been cancelled in accordance with the requirement that a calendar month notice be given to it by Transnet. The task

decision that the matter was urgent was, however, kept open for argument by MTN. The latter’s counsel did, in fact, argue that the matter was not urgent. First, MTN alleged that Transnet waited a period of 20 days before lodging its complaint and that this alleged delay was excessive and unreasonable. Second, that Transnet’s urgency was founded on an incorrect contention that the MTN agreement terminated on 9 March 2018. The CCC agreed with the decision of the Chair that the matter was urgent. Porting was clearly an urgent matter in the circumstances.

of the CCC is, however, to decide whether the Porting Regulations 2005 have been complied with by MTN, whether the contract is valid or not.

[5] Transnet's complaint is based on the fact that it has a contract with Vodacom and that Vodacom cannot deliver in terms of the contract if MTN does not port the numbers. The complaint was limited to the porting of numbers to a certain group of employees of Transnet. The matter of non-porting of numbers to personnel involved in field services was not included in the complaint. Thus, the non-porting to Transnet employees who are not involved with the locomotives, is what we have before us. The latter group amounts to more or less 12000 employees. The CCC cannot go outside the four corners of the complaint. This judgment will, accordingly, only relate to the said, more or less, 12000 employees not involved with the field services.

[6] The validity of the award of the contract is disputed by MTN in an application for review which, we were informed, will be heard by the High Court in June 2018. It is our considered view that the CCC cannot and thus, may not, given the immediate duties prescribed by the Porting Regulations 2005, await the outcome of that matter, since the process before the Courts (which could possibly include appeals) may last an indefinite period. ICASA is called upon to apply the Porting regulations on an urgent basis. MTN has, however, argued that its contract has not been validly cancelled and, accordingly, that it is not under a duty to port numbers to Vodacom.

[7] Whatever the legal position is in regard to the cancellation of the contract, ICASA is, as the institution primarily entrusted by law with governing this sphere of our economy,³ called upon to act – with due urgency – to ensure that porting

³ *Glenister v President of the RSA* 2009(2) BCLR 136(CC) [2008 JOL 22590(CC)] at para [34] where Langa CJ states as follows: [33] In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds. But even in these circumstances, courts must observe the limits of their powers.[34] In *Doctors for Life*, the court made these points: "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious

takes place in terms of Transnet's contract with Vodacom. MTN cannot be seen to simply take the law into its own hands. Vodacom has a valid contract with MTN and Transnet has an obligation in terms of a contract with Vodacom to demand that it ports the numbers to Vodacom. In fact, it has an immediate duty to do so and since MTN was not willing to do so, arguing that its contract was still in place, Transnet approached the CCC. Even if the contract was not validly cancelled, it does not mean that MTN is permitted, in terms of the Porting Regulations, to not port. As matters presently stand, the duty to port in terms of the Regulations is incontrovertible.

[8]It is, of course, true that the High Court may, on review in June, set aside the award of the contract to Vodacom. The CCC, however, has a duty to decide on the facts as they are presently before it. In any case, it is not unlikely that if MTN is successful in its review application that Transnet and Vodacom will appeal that decision. Thus, for the CCC to await the outcome of the review application-possible appeals included – would amount to ignoring its duties to ensure that the Porting regulations are abided by on an urgent basis and to advise the Council of ICASA accordingly.

THE PORTING REGULATIONS

[9] The next matter and, ultimately the only matter for the CCC to consider, is what the Porting Regulations provide and whether MTN has abided by these Regulations. Regulation 4(9) of the Schedule to the Porting Regulations⁴ sets out *exhaustive* grounds upon which MTN (the donor) may reject a porting request. These are: the Mobile Station International Integrated Services Digital Network Number (MSISDN) is not a valid number on the donor operator's network;⁵ the MSISDN number is excluded from number portability under sub-regulation 2(2);⁶ the account number in the request is not the account number used by the donor

of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution. (Footnotes omitted). Also see *Gatooma Rural Council v Crook* 1974(3) SA 840(RAD).

⁴ Published in the Government Gazette (No 28091 of 30 September 2005) under the heading in the Schedule: Functional Specification for Mobile Number Portability under the Number Portability Regulations. Hereinafter called the "Porting Regulations"

⁵ Porting Regulation 4(9)(a).

⁶ Porting Regulation 4(9)(b).

side for the MSISDN for which porting is requested (post-pay only);⁷the classification of the account does not match, for example a request made under the pre-pay procedure for a post-pay account;⁸the subscriber is already subject to suspension of outgoing or incoming calls because of a failure to pay a bill;⁹the number is already subject to a porting process;¹⁰the number has already been ported in the last two months;¹¹ and any other reason agreed to by ICASA and notified to the operators in writing.¹²

Not one of these exceptions supports MTN’s defence. It must, clearly port, whatever its opinion on the validity of the cancellation of its contract with Transnet is.

[10]Notably, Regulation 4(11) specifically states that a donor may not refuse to port due to alleged outstanding amounts, unless the condition prescribed therein prevails (which in the present case, it does not). Regulation 4(11) states:

“A donor side shall not reject a request to port a mobile number under a post pay account on the grounds that the subscriber still owes money, nor may they delay the porting until the debt is collected, unless the subscriber is already subject to suspension of outgoing or incoming calls because of failure to pay a bill.”

[11]In terms of the Regulation 4(10) of the Porting Regulations MTN must report its reason for rejection to the recipient side.

Initially MTN responded to Transnet’s request to port by raising concerns about the *“feasibility regarding the safe and successful migration of services”* and alleging that *“there were outstanding payments due by Transnet.”*¹³

Transnet’s response, in the CCC’s view, addresses MTN’s concerns about the safe and successful migration (or porting) of Transnet’s numbers: it was pointed out

⁷ Porting Regulation 4(9)(c).

⁸ Porting Regulation 4(9)(d).

⁹ Porting Regulation 4(9)(e).

¹⁰ Porting Regulation 4(9)(f).

¹¹ Porting Regulation 4(9)(g).

¹² Porting Regulation 4(9)(h).

¹³ Transnet complaint affidavit, annexure MM2, page 20

that the notice does not relate to the provision of *field and rail services* (where there could be risks) and is limited to *mobile or cellphone voice and data services* (“*cellphone services*”) to other employees.

[12] To the extent that Transnet is allegedly indebted to MTN, Transnet has offered “*to settle all outstanding arrears*” and agrees to the CCC advising an order that “*MTN ports, with the proviso that all arrears are settled.*”¹⁴ The alleged bases of refusal are, in any event, not permitted grounds of refusal to port, as contemplated by the Porting Regulations.¹⁵

BACKGROUND

[13] So as to provide the background to the present matter, the following was placed before the CCC by Transnet:

MTN was previously contracted by Transnet to provide Voice and Data Cellular Services (“the services”). These services included the provision of cellphone and services. The services that form the subject matter of this complaint relate to the *cellphone* numbers that MTN is required to port to Vodacom’s network. Transnet’s telemetric SIM cards attached to *locomotives (field services)* do not form the subject matter of this complaint.¹⁶ On or about 31 March 2017, Transnet invited tenderers to bid for the provision of the services under tender number GSM/17/01/1504 (“the Tender”).¹⁷ Following an adjudication process, Vodacom was shortlisted as the successful bidder for the Tender.¹⁸ MTN’s bid was disqualified at the administrative stage of the tender process, for failure to comply with the requirements of the Tender.¹⁹ MTN lodged a complaint against its disqualification with Transnet’s Procurement Ombudsman.²⁰ Before the Ombudsman had finalised its investigation, MTN instituted an urgent application that was set down for 8 September 2018. The urgent application sought to interdict Transnet from awarding or implementing the Tender, pending finalization of an expedited review application.²¹ On 5 September 2017, Transnet gave an undertaking that it would not proceed with implementation of the Tender until the Ombudsman’s investigation was finalised. Transnet’s undertaking led to MTN withdrawing its application from the urgent court roll.²² The Ombudsman appointed Saljee Govender Van der Merwe Inc Attorneys to conduct the investigation.²³ On 11 October 2017, MTN was advised in a letter dated 9 October 2017

¹⁴ Transnet complaint replying affidavit, page 284, paragraph 23

¹⁵ Promulgated in G Notice R963 in Government Gazette no. 28091 of 30 September 2005

¹⁶ Transnet complaint affidavit, page 20, paragraph 17

¹⁷ Transnet complaint affidavit, page 7, paragraph 8

¹⁸ Transnet complaint affidavit, page 7, paragraph 9

¹⁹ MTN answering affidavit, page 85, paragraphs 23 and 24

²⁰ MTN answering affidavit, page 86, paragraph 28

²¹ Transnet complaint affidavit, page 8, paragraph 11; and MTN answering affidavit, page 86, paragraph 31

²² Transnet complaint affidavit, page 8, paragraph 13

²³ MTN answering affidavit, page 87, paragraph 35

that the Ombudsman had dismissed MTN's complaint²⁴. In the letter, the Ombudsman advised MTN that:

"3.2 MTN deliberately did not comply with the bid instruction. MTN's failure to do so meant that its bid could not be evaluated on a like for like basis against other bidders.

3.3 As a peremptory requirement Transnet could not condone non-compliance therewith, without affecting the fairness and transparency of the tender process.

3.4 Transnet acted lawfully in disqualifying MTN for failing to comply with the peremptory requirements of the bid.

4. Our recommendation is that Transnet should continue with the tender process."

Following the issue of the Ombudsman's report, MTN sought a further undertaking from Transnet, that it would not award/implement the Tender with Vodacom pending finalization of the review application. No undertaking was provided to MTN by Transnet.²⁵ On 14 December 2017, Transnet provided MTN with a signed contract addendum that extended the contract between the parties ("the MTN agreement") by a period of three months (from 10 December 2017 to 9 March 2018).²⁶ This was the fourth addendum to extend the MTN agreement. On 2 February 2018, Transnet concluded an agreement with Vodacom for the rendering of the services ("the Vodacom Agreement").²⁷ On 9 February 2018, MTN revived its urgent application in the High Court and served an amended notice of motion and supplementary affidavit on Transnet's legal representatives.²⁸ In a letter dated 9 February 2018, Transnet advised MTN that it would not extend their agreement beyond 9 March 2018. Transnet also requested MTN to prepare a Services Disengagement Plan, which included, *inter alia*, porting of all cell phone numbers onto the Vodacom's network, reconciliation of the entire Transnet account as well as any other matters necessary for Vodacom to take over as the new service provider. MTN was requested to provide these by 16 February 2018.²⁹ On 15 February 2018, MTN wrote to Transnet³⁰ advising, *inter alia*, that it had reservations regarding the feasibility of MTN ceasing to render services as at 09 March 2018 as Transnet *"has a number of mission critical and safety related services, the disruption of which could lead to operational incidents including loss of lives"* and that Transnet should accept the risks in writing and pay MTN's account in full. MTN also recorded that: *"10. With this written acceptance of the risk and upon payment of MTN account in full and in the absence of any court challenges the porting of these lines would involve the following steps: 10.1 New service provider would institute a port request; Upon acceptance of the port (in line with ICASA regulations), the number would be ported to the new service provider and service on the old service provider would terminate. The new service provider would need to issue a new sim card to Transnet with the number activated on the sim. 10.2 Transnet would need to perform*

²⁴ MTN answering affidavit, annexure AA6, page 234

²⁵ Transnet complaint affidavit, page 9, paragraph 15

²⁶ MTN answering affidavit, page 91, paragraph 50. Addendum notice p 253

²⁷ Transnet complaint affidavit, page 9, paragraph 16

²⁸ Transnet complaint affidavit, page 10, paragraph 20

²⁹ Transnet complaint affidavit, annexure MM1, pages 18 to 19

³⁰ Annexure MM2 p 20 - 21

a change control of the 13 398 sims which could include but not limited to (dependent on each device OEM/support provider processes);10.3 Dispatch a field services team (Transnet or Support Provider) to physically remove the MTN sim and install the new service provider sim (for sims on trains the train would need to be stopped for the physical swop);10.4 Configuration of devices would need to be performed on site or where applicable removed to be configured in the support provider labs.”

[14] It is clear from the above that MTN’s concerns were only directed at *field* services and found no application to employees not in that division of Transnet. Furthermore, despite the fact that it had already reinstated its urgent application, it was pointed out by Transnet that MTN did not raise the pending High Court application or any alleged unlawfulness as reasons not to port. MTN accepted in the letter that the agreement would lapse on 9 March 2018 and said: “5. As per your letter, MTN takes it that as at 00:00, 9 March 2018, MTN must seize [sic] to deliver any services as currently described in the MSA.”

[15] Transnet and MTN agreed to meet on 22 February 2018 to discuss, *inter alia*, MTN porting all cellphone numbers onto the Vodacom network. On or about 26 February 2018, MTN advised Transnet in writing that, among the issues discussed at the meeting of 22 February 2018, Transnet’s request is (it alleged) unlawful and that MTN does not wish to be party to it. In this respect, MTN alleged that Transnet had failed to conduct the tender in a procedurally fair and equitable manner.³¹

[16] It was submitted by Transnet before the CCC that there has not been any finding that the award of Transnet’s Tender was unlawful nor had the award been set aside. In fact, the Ombudsman found that Transnet acted lawfully and recommended that Transnet proceed with the tender. Given that MTN’s alleged concerns or objections appeared to only relate to *field/rail* services, on 27 February 2018, Transnet’s legal representatives wrote to MTN’s attorneys seeking clarification on whether MTN was refusing to “*Port all numbers linked to voice and data services onto the Vodacom network*” and/or “*Render field services to Transnet.*”³² A similarly worded letter was sent by Transnet to MTN.³³ After repeated calls by Transnet’s legal representative for an urgent response from

³¹ Transnet complaint affidavit, annexure MM3, page 22

³² Transnet complaint affidavit, annexure MM4, page 24

³³ Transnet complaint affidavit, annexure MM5, page 25

MTN's legal representatives,³⁴ MTN's legal representatives responded on 28 February 2018 and stated that:³⁵

"10. In short, the porting of numbers at this stage will only serve to thwart the interdict application, whilst rendering the review application academic.

11. In addition thereto, and as previously stated in our letter of 12 February 2018, MTN has been appointed as Transnet's sole and exclusive service provider. As such, Transnet may not procure the services from another provider during the subsistence of the contract.

12. Clause 4.2 specifically provides that:

"Transnet is precluded from directly or indirectly obtaining any services from a Competitor which are the same or similar to the services, unless such services relate specifically to Transnet's operational network requirements"

13. The contract between MTN and Transnet remains valid and binding. In these circumstances, the porting of the number to Vodacom, which will result in Transnet acquiring the services from a competitor, amounts to a breach of clause 4 of the agreement between the parties.

14. Transnet's conduct, in seeking to port the numbers to Vodacom during the subsistence of the contract, accordingly amounts to a breach and/or repudiation of the contract between the parties. MTN does not accept such repudiation and holds Transnet to its obligations in terms of the contract.

15. Furthermore, the numbers which Transnet seeks to port out are subject to suspension, as Transnet is indebted to MTN in the amount of R 23 738 311.29, R 15 594 922.68 of which is in arrears. Clause 7.8 entitles MTN to reject to port requests under these circumstances."

LODGING OF COMPLAINT WITH THE CCC

[17] Following receipt of this letter and MTN's express refusal to port, on 2 March 2018, Transnet lodged the complaint which is now before the CCC for determination.

FINDING BY THE CCC

[18] Having considered the evidence placed before the CCC, including legal argument, the CCC concludes as follows on the merits of the Complaint by Transnet:

³⁴ Transnet complaint affidavit, annexure MM6, pages 27 to 30

³⁵ Transnet complaint affidavit, annexure MM7, pages 31 to 24

(a) A porting request was made by Transnet to MTN to port the mobile phone numbers of its employees to Vodacom. There are more or less 12000 employees in this group.

(b) This request was denied by MTN, except in the case of a few initial requests.

(c) The denial amounted to a contravention of the Porting Regulations (R.963) as published in the Government Gazette (No 28091) of 30 September 2005.

(d) Not one of the grounds for rejection of such a request, set out in (Schedule) Regulation 4(9), is applicable to MTN.

[19]It is clear to the CCC that if MTN is not urgently directed to port Transnet's mobile phone numbers, Transnet's business operations will be negatively affected and severely compromised. In this respect: The following evidence before the CCC is accepted: Transnet has about 65 000 employees within 6 divisions and two specialised business units. About 12 000 of these employees need voice and data services through the use of cell phone and SIM cards in order to discharge their duties towards Transnet and the general public. The said services play a critical role in ensuring Transnet's business continuity. Furthermore, MTN's continued refusal to port is also hampering the implementation of the Vodacom agreement. Transnet and Vodacom have concluded a valid agreement that both parties are entitled to enforce. MTN is, accordingly, under an immediate duty to port these numbers to Vodacom.

ADVICE TO THE COUNCIL OF ICASA AS TO AN ORDER IN TERMS OF SECTION 17D Read 17E(2)(c) of the ICASA Act :

To order MTN to port all the requested numbers to Vodacom (Pty) Ltd as prescribed by the Regulations published on 30 September 2005 in Government Notice R.963 within seven calendar days after the order of the Council of ICASA is issued.

The term of seven calendar days to commence on the day after the order by the ICASA Council is issued.

[The term of seven days is imposed so as to grant MTN a reasonable opportunity to port].

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

The members of the CCC agreed with the above order.