



Independent Communications Authority of South Africa

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Dear Ms. Megan Rossouw and Mr. Corlett Manaka

VODACOM (PTY) LTD VERSUS MOBILE TELEPHONE NETWORKS (PTY) LTD
CASE NUMBER: 283/2018

The above matter has reference.

This is to advise the parties in the matter between Vodacom (Pty) 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 Vodacom 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 29 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: 29 March 2018

Case Number: 283/2018

VODACOM (PTY) LTD

COMPLAINANT

v

MOBILE TELEPHONE NETWORKS (PTY) LTD

RESPONDENT

PANEL: Prof JCW van Rooyen SC, (Chairperson)
Cllr. Nomonde Gongxeka-Seopa (ICASA Councillor)
Mr. Peter Hlapolosa
Mr. Mzimkulu Malunga
Mr. Jacob Medupe
Mr. Jack Tlokana

For the Complainant: Advocate M. Chaskalson SC and with him Advocate R. Tshetlo instructed by Edward Nathan Sonnenberg, Sandton

For the Respondent: Advocate T. Motau SC and with him Advocate L. Kutumela instructed by Werksmans Attorneys, Sandton

Ms. Lindisa Mabulu - Coordinator of the CCC

JUDGMENT

JCW VAN ROOYEN SC

INTRODUCTION AND COMPLAINT

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 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 whether 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) are justified. Where a complaint is dismissed the decision is final and only subject to review by a Court of Law. 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.

[1] This is a complaint by Vodacom (Pty) Ltd against Mobile Telephone Networks (Pty) Ltd to port mobile phone numbers to it in terms of Regulations published on 30 September 2005. Both parties to this matter have licenses to provide a mobile telephone service. It is undisputed that MTN has provided mobile telephone services to Transnet (Soc) Ltd for a number of years. In 2017, however, MTN's tender for a renewal of its contract was removed from the tender list by Transnet on grounds which were upheld by an Ombudsman appointed for this purpose. The contract was awarded to Vodacom. MTN is disputing the validity of its removal from the list and an application for review of the validity thereof is set down for June 2018 before the South Gauteng High Court. MTN also brought an urgent application before the same Court on 22 March 2018 to interdict Vodacom and Transnet from giving effect to the award to Vodacom pending the outcome of the review application in June. The urgent application was, however, struck from the roll by Opperman J.

[2] Mr *Chaskalson* SC, in argument before the CCC, set out the main contention against MTN as follows:

Vodacom (Pty) Ltd (**Vodacom**) brings this complaint for redress against Mobile Telephone Networks (Pty) Ltd (**MTN**) in view of MTN's violation of the Number Portability Regulations promulgated by Government Gazette No. 28091 (the **Porting Regulations**). MTN has not only breached the Porting Regulations, it has done so flagrantly and with open contempt for the law. Its real reason for doing so is unlawful. It professes a concern for section 217 of the Constitution and legislation governing public procurement. Yet its purpose is to force Transnet SOC Ltd (**Transnet**) to continue paying MTN under a cellphone services contract that, in terms of the very same legislation, ought to have expired more than a year ago in October 2016. It cannot confess to its unlawful purpose. So it has disingenuously had to present false reasons for its refusal to port numbers to Vodacom as it is obliged to do in terms of the Porting Regulations. Thus far MTN has changed its version in this regard five times. None of the changing versions comes close to justifying a refusal to port that is allowed under the Porting Regulations. MTN must accordingly be ordered to comply with the law and immediately to port to Vodacom the Transnet numbers that Vodacom has requested to be ported.

[3] It should be recorded that an application by Vodacom to join the hearing of Transnet's complaint before the CCC on 19 March was not permitted since joinder is not a procedure which is provided for in the ICASA Act or the CCC Regulations. Vodacom was similarly not permitted to have its case heard on the same day as the complaint by Transnet. This was done on the basis that Transnet was in charge² of its complaint and that there was no indication from it that it had any intention to draw Vodacom in when arguing its complaint before the CCC. Vodacom then filed a complaint with the CCC against MTN, which had to be considered in terms of section 17B(a)(ii). The parties were called to a hearing on 29 March 2018.

[4] In accordance with the Regulations which Govern Aspects of the Procedure before the CCC, it was decided by the undersigned, on application by Vodacom, that the complaints from Transnet and Vodacom were both urgent, subject to MTN's right to dispute urgency. MTN disputed this provisional approach on urgency. The undersigned remained of the view that, in both matters, the complaints were urgent. It is clear from the relevant 2005 (Porting) Regulations that the duty to port is an important matter which should not be hampered, in the ordinary course, by the time periods prescribed in the Regulations, especially given the fact that the word "day" has from May 2014 been amended in the ICASA Act to a working day. Vodacom also referred to the fact that it was impossible for it to render the services to Transnet without the more or less 12000 mobile numbers being ported to it. It was, accordingly, not possible to debit the account of Transnet for services rendered, since its provision of services to Transnet was blocked by the approach of MTN. A daily substantial loss of income was thus being experienced by Vodacom.

POINTS RAISED AT THE COMMENCEMENT OF THE HEARING

² In legal parlance referred to as the *Dominus Litis*.

[5] At the commencement of the present hearing Mr *Motau*, Senior Counsel for MTN, informed the CCC that the issue whether the contract between Transnet and MTN had been validly cancelled by Transnet was set down on the ordinary roll of the High Court for mid May 2018. With that he also applied that the present hearing be suspended until judgment has been handed down in that matter. It was also argued that, in any case, the matter before the CCC amounted to duplicity of actions, which has been held to be unacceptable by the Courts over many years.³ Transnet had, it was argued in this regard, already filed a complaint against MTN with the CCC and that matter was heard on the 19th March. It was, however, conceded that the matter was not between the same parties - the other matter heard on the 19th March having amounted to a complaint by Transnet against MTN. The plea of the same matter pending (*lis pendens*) could, however, so it was argued, equally be raised in the present matter. It is true that the outcome sought in the two matters is identical, however, Vodacom, as the licensee to which the contract has been awarded, also has the right to complain to the CCC, which has the duty to consider and if appropriate hear complaints in terms of section 17B(a)(ii) of the ICASA Act. The CCC must, in any case make a finding according to the said subsection.

[6] MTN argued that its contract had not been cancelled validly, since a calendar month notice had not been given – a calendar month, it was contended, amounting to a month notice from the first of a month, which was not the case here. There is also an application by MTN for the review of the granting of the tender, which will be heard by the High Court, in the ordinary course, in June 2018. The order sought, however, does not include that the Court awards the tender to MTN, but that the award to Vodacom be set aside and that the tender process be commenced afresh. We will get back to the matter of *lis pendens* at the end of the judgment. However, the CCC was unanimous that the complaint must be heard so as to also consider the matter from the perspective of a service provider which, in spite of its contract, could not deliver services to Transnet in the absence of porting of the numbers by MTN.

³ See *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* 2014 (5) SA 562 (SCA).

[7] On the 19th March the Complaints and Compliance Committee (“CCC”) heard a complaint from Transnet (Soc) Ltd against MTN for omitting to port the required numbers (which run into more or less 12000, we were informed). The complaint was limited to the porting of mobile phone numbers to employees who are not connected to the so-called field services of Transnet. The latter services are, however, also part of the contract awarded to Vodacom. The CCC will, accordingly, limit its finding to what was stated in the complaint by Vodacom.

It should be mentioned that both matters were placed for discussion of the merits and a decision on 12 April 2018. There had, accordingly, been no discussion of the merits by the CCC in both matters before that. And, of course, each matter was discussed separately.

MERITS OF THE COMPLAINT

[8] Vodacom’s complaint is based on the fact that it has a contract with Transnet. The validity of the award of the contract is disputed by MTN in an application for review which, we were informed, will be heard in June 2018. Both parties before the CCC claim to have a contract – MTN arguing that its contract had not been validly cancelled and, accordingly, that it is not under a duty to port numbers to Vodacom. MTN’s argument is that Transnet was under a contractual duty to give one calendar month notice, and since the notice was not given on the first day of the relevant month, a *calendar month* notice had not been given. A “calendar month”, according to several judgments of our Courts, however, does not mean that notice must be given on the first day of a month. In this regard Judge Coetzee stated as follows in *Argus Printing and Publishing Co Ltd v Minister Internal Affairs* 1981 (2) SA 391 (W):

A point which I should perhaps mention for the sake of completeness, which was raised on behalf of the applicant, is that the word "month" should be interpreted to mean that at any time during November, and not necessarily within the specific period of one month, these newspapers could have been published. This argument is completely without substance and ignores all learning on the computation of time. "Month" in terms of the Interpretation Act 33 of 1957 means a calendar month and a calendar month has for centuries already been computed by looking at the calendar and, without counting the days, calculating it from the day of the happening of the event to the day

numerically corresponding to that day in the following month, less one. This appears from Stroud *Judicial Dictionary* which is quoted by Steyn in *Uitleg van Wette* 4th ed at 171.

This approach has also been applied in other judgments of our Courts.⁴ It does not, however, apply to contracts of lease and employment.⁵ Whatever the position is, the CCC's only task is to reach a decision in terms of the 2005 Porting Regulations.

THE PORTING REGULATIONS

[9] Regulation 4(9) of the Schedule to the Porting Regulations⁶ 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;⁷ the MSISDN number is excluded from number portability under sub-regulation 2(2);⁸ the account number in the request is not the account number used by the donor side for the MSISDN for which porting is requested (post-pay only);⁹ the classification of the account does not match, for example, a request made under the pre-pay procedure for a post-pay account;¹⁰ the subscriber is already subject to suspension of outgoing or incoming calls because of a failure to pay a bill;¹¹ the number is already subject to a porting process;¹² the number has already been ported

⁴ Cf. *Subbulutchimi v Minister of Police & Another* 1980(3) SA 396(D); *Makutchi NO v Minister of Police* 1980(2) SA 229(W); *S v Mogale* 1989(4) SA 591(W).

⁵ *Stocks & Stocks Holdings Ltd & Another v Mphilo* 1996(2) SA 864(T).

⁶ See Government Gazette 30 September 2005 (No 28091)

⁷ Porting Regulation 4(9)(a).

⁸ Porting Regulation 4(9)(b).

⁹ Porting Regulation 4(9)(c).

¹⁰ Porting Regulation 4(9)(d).

¹¹ Porting Regulation 4(9)(e).

¹² Porting Regulation 4(9)(f).

in the last two months;¹³ and any other reason agreed to by ICASA and notified to the operators in writing.¹⁴

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.”

Regulation 4(16) provides as follows:

The donor side shall respond to requests from a recipient side, and effect any actions requested, as soon as possible and within one hour where the responses or actions are required as soon as possible.

[10] The only reason that MTN has provided for not porting the numbers is that it still has a valid contract with Transnet. Its urgent application to extend the contract with Transnet until the outcome of the review application in June 2018 has, however, been struck off the roll by the High Court on the 22nd March. As mentioned, MTN has, we were informed at the hearing, filed an application with the High Court for mid-May to decide that its contract has not been cancelled validly. At the hearing of this matter we were informed by Vodacom’s senior counsel that given possible extensions of time periods, the matter might not, indeed, be heard in May. *Be that as it may, the CCC’s task is to determine whether the Porting Regulations have been contravened by MTN not whether it still has a contract with Transnet.*

PORTING REQUESTS BY VODACOM

[11] In order to assist with the porting of Transnet’s mobile numbers, on 13 February 2018, Vodacom prepared and submitted nine porting requests to

¹³ Porting Regulation 4(9)(g).

¹⁴ Porting Regulation 4(9)(h).

MTN based on the information provided by Transnet. The purpose of the porting requests was, the CCC was informed, to ascertain what information, if any, MTN would require in order to undertake the porting requests. MTN approved the said porting requests. The Transnet's company number used for these requests was 1993/003367/07.¹⁵

[12]Subsequently, Vodacom prepared and submitted, in three batches, porting requests to MTN.¹⁶ The following, according to Vodacom, then transpired: On 26 February 2018, Vodacom submitted a total of 10218 porting requests to MTN. The registration number used was 1990/000900/30. MTN approved all but 1599 porting requests. The rejection code was "*SP003: Account Details mismatch*". Upon further enquiry by Vodacom, MTN advised Vodacom that the rejection related to the fact that an incorrect registration number was used.¹⁷ On 28 February 2018, Vodacom submitted 10218 porting requests. Of these, 9824 were rejected by MTN. The reason for the rejection, again, was code "*SP003 Account Details Mismatch*". MTN insisted that an incorrect registration number had been used, despite having previously approved the porting requests pursuant to the test-run. MTN resolved not to engage Vodacom further and insisted that Transnet ought to contact Vodacom to "verify their account details". The reluctance/denial of MTN to port was contended by Mr *Chaskalson* SC, acting for Vodacom, to fly in the face of Regulation 4(10), which provides that "at the time when a donor side rejects a request, it shall report the reason for rejection to the recipient side." Again, on 28 February 2018, Vodacom submitted a further porting request using registration number 1990/000900/06, which was also rejected.

[13]The alleged problem with account details was the first version given by MTN for refusing to port numbers to Vodacom. It was contended by Vodacom that there was no problem with the account details furnished by Vodacom. MTN has, it was contended, never attempted to explain why it

¹⁵ Vodacom FA, p9, para 18.

¹⁶ Vodacom FA, p9, para 19.

¹⁷ Vodacom FA, pp9-10, paras 20.1 and 20.2.

repeatedly denied the porting of the numbers and regarded them as “false.” The “blatant falsity” of the MTN “explanation”, according to Vodacom, only emerged later, because after 1 March 2018 MTN refused to disclose any further information to Vodacom and, it was argued, unlawfully insisted, in breach of the procedures required by the Porting Regulations, that it would communicate only with its client, Transnet. Thus Vodacom requested Transnet to confirm the exact requirements for porting submissions. It then transpired – thus the argument of Vodacom ran - that the reasons for the refusal to port did not relate to the incorrect registration numbers, but rather: On 15 February 2018, MTN wrote to Transnet¹⁸ advising, *inter alia*, that it had reservations regarding the feasibility of MTN ceasing to render services as at 9 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. This, it was argued, was a further version furnished by MTN for its refusal to port. [15]

[14]On or about 26 February 2018, MTN wrote to Transnet referring to a meeting of 22 February 2018 where it alleged that Transnet’s request to port was unlawful and that MTN did not wish to be party to the unlawfulness. This, Vodacom argued, was a further version advanced by MTN for its refusal to port. It, obviously, relates to the contention that Transnet had failed to conduct the Tender in a procedurally fair and equitable manner. This is, of course, a matter for the High Court to determine in the review proceedings. Presently, however, Vodacom has a contract with Transnet to provide mobile phone services. And that entitles it to demand from MTN to port the Transnet numbers to it.

FINDING

Having considered all the facts the CCC has come to the following conclusion:

¹⁸ Transnet’s Complaint, p20-1, Annexure “MM2”.

(1)The CCC is called upon to decide this complaint in spite of legal challenges by MTN as to the award and subsistence of the contract before the Courts. It is an administrative tribunal in terms of section 33 of the Constitution - recognized as such by the Constitutional Court¹⁹ - which is seized with this matter.²⁰

(2)Furthermore it is clear from section 17B(a)(ii) and(iii) read with section 1 of the ICASA Act that the CCC has jurisdiction to hear complaints against licensees (in this case MTN) which are alleged to have not complied with regulations which pertain to them.

[3] Vodacom has a contract with Transnet to provide mobile services to it. It has requested MTN to port the mobile numbers of more or less 12000 employees of Transnet. MTN has, in conflict with Regulation 4(9) rejected request by Vodacom to port these numbers.

[4] Vodacom's complaint is thus upheld.

ADVICE TO COUNCIL of ICASA AS TO AN ORDER

It was argued at the commencement of the proceedings that MTN, if found by the CCC to have contravened the Porting Regulations, would effectively be subject to double jeopardy. We decided to nevertheless hear the complaint from the perspective of Vodacom and address the argument of double jeopardy at this stage of the proceedings.

So as to ensure that MTN is not subjected to **two orders** of Council of ICASA which have the same contents and relevance, the CCC has decided to simply bring the above *finding* to the notice of the Council without including advice as to an order.²¹ Had Vodacom's complaint been the only one, the

¹⁹ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC).

²⁰ Also see footnote 7 above.

²¹ Also compare section 35(m) of the Constitution of the Republic of South Africa: Every accused person has a right to a fair trial, which includes the right:
(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

advice to the order would, of course, have been included. It would have been the same advice.

The order advised in the matter of Transnet v MTN (Case 282/2018) is thus the only **order** before Council. For the record it reads as follows:

1. That MTN be ordered by Council of ICASA to port the required numbers to Vodacom within seven days from when this order is issued by the Council of ICASA.
2. That the seven days be calculated without inclusion of the day on which this order is issued.
3. That “day” means a calendar day running from the day after the issue of this judgment until midnight of the seventh day.

A handwritten signature in black ink, reading 'J.C.W. van Rooyen' in a cursive script.

JCW van Rooyen SC

The members of the CCC agreed with the above finding.