COMPLAINTS AND COMPIANCE COMMITTEE

Date of hearing: 03 May to 04 May and 10 July and 18 July 2012

Case No: 60/2011

IN THE MATTER BETWEEN

INDEPENDENT COMMUNICATIONS AUTHORITY

OF SOUTH AFRICA

And

TELKOM SA (PTY) LTD

COMPLAINTS AND COMPLIANCE COMMITTEE

JW Tutani Chairperson

N Batyi

T Ramuedzisi

J Tlokana

N Ntanjana

For the Complainant: Ms I Kruger from Damons Magardie Richardson, Attorneys, Pretoria

For the Respondent: I Semenya SC, instructed by Maluleke Msimang and Associates, Attorneys, Pretoria

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JUDGMENT

[1] The Complainant in this matter is the Independent Communications Authority of South Africa (the ''Authority'') whose functions include monitoring the electronic communications sector to ensure compliance with the Independent Communications Authority of South Africa Act, No 13 of 2000 (the " ICASA Act.") The Authority is also empowered to, *inter alia.* make regulations on any matter consistent with the objects of the Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority.[1]

[2] The Respondent is Telkom SA (Pty) Ltd (Telkom) an electronic communications service (ECS) and electronic communications network service (ECNS) licensee contemplated in Regulation 2 of the End-User and Subscriber Service Charter Regulations (the "Regulations.")

[3] ICASA alleged that Telkom failed to comply with the following Regulation.

Regulation 4.9(a): ".....maintain an average of 90% fault clearance rate for all faults reported within three (3) days;'' and

Regulation 4.9(b): must clear "the remaining ten per cent (10%) of faults reported .....within six (6) days of the reporting of the fault.''

> "In respect of the abovementioned regulations for 2009/2010 reporting period, Telkom did not meet the mandatory percentages as prescribed in respect of the fault clearance rate."

[1] See Section 4 of the ICASA Act.

[4] This matter came before the Complaints and Compliance Committee on 03 May for a hearing but Mr Semenya SC, applied for a stay of the proceedings on the grounds that Telkom was of the opinion that the Regulations were not valid and that they wanted to challenge their validity in the High Court.

[5] After hearing opposing argument from Ms Kruger, the CCC ruled that the hearing should proceed.

Gaps in the transcript of 03 May 2012

[6] There are gaps in the transcript dated 3 May 2012 and certain sentences are marked "inaudible". In the Transcriber's Certificate on the last page of the transcript, the transcriber has recorded that the proceedings were recorded in an extremely noisy room. The transcripts of 9, 10 and 18 July 2012 are in a good condition.

[7] He says there was incessant noise from "unutilised, open (switched on) microphones". There was sighing, whispering loudly, pouring liquid, papers crackling, knocking and moving microphone harshly across the surface, etc.

[8] The list of distractions that we have mentioned is not exhaustive but we have just given examples. The cumulative effect of all of this was to make the recording of the proceedings very difficult, hence the gaps.

[9] In spite of this setback, we decided to utilise the transcript as best as we could and supplement it with our collective notes and memory.

[10] A large part of the transcript is intelligible and where there are gaps, we took refuge from our notes and memory.

Reports submitted by Telkom in terms of the Regulations

[11] All ECS and ECNS licensees are required by Regulation 6 to fulfil certain obligations with respect to the complaints they received. Regulation 6 reads as follows:

(a) Licensees must keep and maintain a record of all complaints received from end-users and subscribers.

(b) Licensees must prepare six-monthly reports on complaints received and processed. Copies of such reports must be submitted to the Authority within one (1) month after the end of the licensee's financial year and every six (6) months thereafter

(c) Licensees must prepare and submit to the Authority six (6) monthly reports on the standards as prescribed in regulation 4.

(d) The reports referred to in sub-regulations 6(b) and (c) of these regulations must be in accordance with the format as may be determined by the Authority from time to time.

Stipulations of Regulation 4.9(a) and (b)

(a) All ECNS and ECS licensees must maintain an average of 90% fault clearance rate for all faults reported within three (3) days.

(b) The remaining ten percent (10%) of faults reported must be cleared within six (6) days of the reporting of the fault.

[12] Although the Authority had not determined a format as required by regulation 6 (d), Telkom prepared and submitted three reports to the Authority in order not to fall foul of the Regulations. We commend Telkom for this initiative.

[13] In the first report, in April 2010, the percentage of faults cleared within three days was 75.85% under Regulation 4.9(a) and the percentage of faults cleared within six days was 90.13% under Regulation 4.9(b). When submitting this report, Telkom pointed out that this report followed the format submitted to the Authority on 20 January 2010 and again on 26 February 2010.

[14] In September 2010, Telkom submitted another report which showed the percentage of faults cleared within three days as required by Regulation 4.9(a) as 72.97% and that of faults cleared within six days in terms of Regulation 4.9 (b) as 85.69%.

[15] The last report, the supplementary report was submitted in May 2011. In this report Telkom advises as follows:

> *"Following the publication of the above regulations in July 2009, and in the absence of a standard format as contemplated in regulation 6(b), Telkom submitted a proposed reporting format to the Authority during January, and again in February, 2010. Although no feedback was received, Telkom proceeded to submit its reports in the format it had proposed. Altogether three reports were submitted in this format; these being in April 2010, October 2010 and April 2011, which were submitted every six months in accordance with regulation 6(b).''*

[16]The May report showed the percentage of faults cleared within three days as 71.26 under Regulation 4.9(a) and the percentage faults cleared within six days was 86.37% under Regulation 4.9(b).

[18] On the face of it, it appears as if Telkom did not comply with the provisions of Regulation 4 and the percentages Telkom managed to achieve in all three reports speak for themselves in this regard.

Determination of a format by the Authority

[19] In our view, Regulation 6(d) makes it clear that the Authority must determine a format from time to time. Ms Kruger argued that from reading sub-regulation 6(d), licensees were only required to start using the prescribed format after the publication of the prescribed format.[2]

[20] She argued that the format was not relevant at all for the reporting period of 2009/2010.

[21] Ms Kruger did not provide any evidence in support of her line of reasoning and, consequently, we reject this argument.

[22]If licensees were to be allowed to create their own formats as they saw fit, chaos would prevail. Without guidance by means of a standard format developed by the Authority, each licensee would guess what needed to go into the report. The Authority would be unable, no matter how hard it tried, to manage that kind of a situation.

[23] Ms Kruger also contended that the word "may'' in Regulation 6(d) is directory and not peremptory. She said the words "as may be'' meant if there was a format determined by the Authority, the reports should be in that specific format. She submitted that any other interpretation would be ridiculous.

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[2] ICASA's Heads of Argument, page 7.

[24] She said she found it strange that there was no evidence showing that Telkom had communicated its confusion to the Authority about the format. She argued that Telkom did not provide any letters or documents or called any other licensees to confirm that the absence of the format was an "utter'' problem in order to comply with the Regulation. [3]

[25] Telkom, on the other hand saw the requirements of the Regulation differently. Mr Semenya quoted extensively from case law in support of his argument that the word may, as used in Regulation 6(d) was obligatory.

[26] He argued that the conduct of organs of state, which ICASA and the CCC were, should be underpinned by fair administrative action and the interpretation of statutes should be in favour and not against those to whom they applied..

[27] In *The Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd,*[4] Moseneke DCJ confirmed that:

> *"The emerging trend in a statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous."*

[28] In *Thoroughbred Breeders' Association v Price Waterhouse*,[5] the Supreme Court of Appeals said:

> *"The days are long past when blinkered peering at an isolated provision in a statute was thought to be the only legitimate technique in interpreting it if it seemed, on the face of it, to have a readily discernible meaning."*

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[3] ICASA's Heads of Argument, page 48.
[4] 2007(6) SA 199 CC.
[5] 2001(4) SA (SCA).

[29] In *Ex Parte Viljoen,*[6] it was held:

> *"Where the word "may'' conveys a faculty of power, there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, i.e. submitted where language couples the power with a duty, then the context in which the word "may'' is used becomes obligatory.''*

[30] Applying the above interpretation principles, Mr Semenya submitted that it was prudent to point to the fact that the obligation of the licensee to report in accordance with a format was plain from a literal meaning of the Regulation. He argued that the word "must'' is used to connote a positive obligation on the licensees when submitting their reports contemplated in the sub-regulation.

[31] He submitted further that the phrase "as may be determined by ICASA from time to time" merely conferred power on the Authority to determine a different format from time to time. What the Regulation did not do, he argued, was to give ICASA the latitude not to determine a format.

[32] Upon reading Regulation 6(d) it is clear, as submitted by Mr Semenya that the word "must'' was used to connote a positive obligation on the licensees. The positive obligation placed on the licensees was to ensure that:

(a) All complied with the standard format as determined by the Authority;

(b) That there was stability in the ICT sector;

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[6] 1929 OPD 125.

(c) There was certainty as to what and how much information to give, how to compute fault clearance rates, how to report on theft, problems associated with the weather, etc;

(d) Consumers were not prejudiced by hiding faults; and

(e) ICASA instituted corrective interventions where non- compliance was detected.

[33] In May 2011, Telkom submitted a supplementary report to ICASA wherein Telkom indicated that it had not received any feedback from ICASA regarding the format it had used in its previous reports. Altogether, three reports were submitted in Telkom's format but ICASA did not react.

[34] We found it strange that even when Telkom stated that it had received no feedback from ICASA, the latter still chose to ignore Telkom's cries..

[35] In the meeting of 12 May 2011, the Authority educated Telkom regarding the information it required in the reports. At that stage ICASA should have been reminded of its duty to determine the format to avoid convening fruitless meetings with the licensees. We are saying these were fruitless meetings because, even after the May 2011 meeting, Telkom continued to submit reports which were not acceptable to ICASA.

[36] The argument by Ms Kruger that Telkom did not provide documents or letters or even called other licensees to confirm that the format was a problem can, with greatest respect, not stand. It was indicated by Telkom in the supplementary report that it had received no feedback from ICASA regarding the format which it had used in the previous reports and in our view, this was enough.

[37] The regulatory powers of ICASA under the ICASA Act and the underlying statutes are aimed at corrective interventions where non-compliance was

detected. When the Authority failed to play its part in ensuring that proper guidance was given to licensees, it gave the licensees a raw deal.

[38] In our view, the Authority's failure to determine a format is a fatal flaw to its case against Telkom. It is true that during the course of the proceedings, the CCC agreed that the word "may'' as used in Regulation 6(d) conferred a discretion on the Authority. However, Mr Semenya argued persuasively against this interpretation and supported his arguments with case law and relevant authorities, hence our decision to find in his favour.

The evidence

[39] The Authority, through Ms Kruger began to call witnesses as the onus-bearing party. She called the Authority's witnesses in the order appearing below.

Evidence-in-chief – Mr Maulana

[40]The first witness to testify on behalf of the Authority was Mr Maulana who is the Manager: ECS and ECNS in the Licensing and Compliance Division.

[41] In his evidence-in-chief, Mr Maulana testified that his main responsibility at ICASA was to ensure that all the licensees adhered to the Regulations. He said in carrying out his responsibilities, he contacted all the licensees and made them aware of what they needed to do to be compliant with the Regulations.

[42] He said they sought submissions from each and every licensee, showing how they were complying with the Regulations. He was handling these submissions personally but was assisted by his staff.

[43] Quoting Regulation 6, he said licensees were required to keep and maintain a record of complaints received from end-users. Licensees should prepare six-monthly reports on complaints received and processed and copies should be submitted to the Authority within one month after the end of their financial year.

[44] He said as a licensee, you were obliged to comply with each and every Regulation. A licensee should read the Regulations and once he understood them and compiled "that information,'' which demonstrated that "this is what we are complying with the licensee, we take that information on that basis....'' Mr Maulana said they relied on the *bona fides* of licensees for the correctness of the information contained in the reports.

[45] Telkom submitted three reports none of which was compliant. In the first report, the percentage of faults cleared within three days was 75.85% versus 90% required by Regulation 4.9(a). Telkom managed to clear 90.13% within six days versus 100% stipulated in Regulation 4.9(b).

[46] In the second report, with respect to Regulation 4.9(a), Telkom achieved a clearance rate of 72.97 within three days against 90% required by the aforesaid Regulation. Regarding Regulation 4.9(b), Telkom achieved 85.69% within six days, thus failing to meet the requirement of the Regulation which was 100%.

[47] After the second report, Council advised Mr Maulana to meet with the licensees to try and find common ground and a meeting between Telkom and ICASA was held on 12 May 2011.

[48] Telkom's previous submissions were discussed and after "greater clarity was obtained,'' Telkom was requested to make a supplementary report which should include the information not provided in the previous reports.

[49] In the supplementary report, Telkom got a clearance rate of 71.26% within three days, instead of 90% as required by Regulation 4.9(a). It got 86.37% within six days versus 100% required by Regulation 4.9(b).

Cross-examination by Mr Semenya SC

[50] Asked during cross-examination whether he accepted that the Authority had not determined a format, Mr Maulana replied "yes."

[51] Then Senior Counsel asked whether a format, properly designed would more or less indicate what information should populate the report, Mr Maulana replied, "no.''

[52] In response to a question from Senior Counsel, Mr Maulana agreed that it was left to all the licensees to determine their formats.

[53] Mr Semenya put it to Mr Maulana that Telkom's report was computed on the basis of excluding Saturdays and Sundays and Mr Maulana's response was that what Telkom did was inconsistent with the instructions given by ICASA.

[54] After trying to avoid making a concession that Telkom was correct to exclude Saturdays and Sundays, Mr Maulana reluctantly conceded and answered in the affirmative.

[55] On page 122 of the transcript of 3 May 2012, Mr Semenya asked whether Mr Maulana was able to determine, on the report submitted to ICASA, what percentage was achieved in the first three days. The response was "no."

[56] Mr Semenya followed- up and asked if Mr Maulana was able to determine what contravention occurred in those three days and again he replied "no.''

[57] On page 144 of the said transcript, asked if it would be a contravention in the eyes of the Authority where Telkom was denied access and was thus unable to clear a fault within three days, Mr Maulana replied that his "best answer to your question is they failed what the Regulation is saying in terms of non-compliance within the regulation. In this case the regulation clearly states that the licensee has to resolve it within three days or in six days, but neither does the regulation say anything to you about access.''

Re-examination

[58] Responding to a question from Ms Kruger, he said, as a Manager in the Compliance office, he had no discretion to deviate from the Regulations or to grant any relaxation for non-compliance. He was then asked to read Regulation 6(c) which he did. He said the six-monthly report in terms of the Regulations was crafted by the licensee. He confirmed that ICASA had not prescribed a format for the report.

Elaborating, he said the reporting period was as stated by Telkom for a period of six months prior to 1 October 2009 to March 2010. He indicated that Telkom had the opportunity to supplement, correct and include information they did not provide before.

Evaluation of Mr Maulana as a witness

[59] Mr Maulana did not acquit himself as a good witness. He contradicted himself and was not prepared to make concessions even in instances where it was glaringly obvious that he had to. If he succumbed at all, it would be after Mr Semenya had used all the tools at his disposal to get a yes.

[60] On page 149 *et seq* of the transcript of 3 May 2012, Mr Semenya put it to Mr Maulana that given Telkom's infrastructure, to achieve 99, 6% fault

clearance rate would take approximately 120 days. He asked him if he was able to contradict that statement.

[61] Mr Maulana avoided answering this question and it had to put to him several times when he eventually replied that "this is the information which the licensee will give to the Regulator, as stated, but again I would have to re-emphasise, based on the finalised regulations this statement in my opinion would be a day too late....."

[62] His evasiveness was so glaring that it prompted a member of the CCC to remark, "I think the question is clear. Is ICASA able to contradict this statement?'' whereupon the Chairperson said the question was whether Mr Maulana understood the question.

[63] When it became clear that Mr Maulana was not prepared to give an answer that made sense, the Chairperson requested Mr Semenya to proceed to the next question.

[64] On page 155 of the transcript of 3 May 2012, Mr Semenya put it to Mr Maulana that there was a marked difference between a mobile operator and a fixed line operator in relation to fault clearance capabilities and Mr Maulana's response was to ask whether Counsel wanted his opinion.

[65] On being told that Counsel wanted the opinion of ICASA, Mr Maulana replied, "That of ICASA? Again I would say in this case pertaining to your question, that should have been raised before the regulation was finalised."

[66] The Chairperson again asked if he understood the question and he responded in the affirmative.

[67] Mr Semenya asked him four times to answer this question and he gave four different answers none of which answered Mr Semenya's question.

[68] The Chairperson intervened and pointed out to Mr Maulana that he should assist the hearing by answering the questions directly. He told him that the hearing was not meant to pin down Telkom but to hear the truth to enable the CCC to come to a just decision. Mr Maulana then asked Counsel to repeat the question.

[69] Mr Semenya repeated the question and when it became clear that he was not prepared to give a direct answer, the Chairperson suggested that he was exhausted and adjourned for lunch.

[70] Mr Maulana was not helpful to the CCC. He emerged from cross-examination as an unreliable witness whose evidence could not be trusted. Accordingly, we rejected his evidence. He avoided answering questions put to him by CCC members which were meant to give clarity to certain issues which were not clear. The CCC did not get the benefit of Mr Maulana's expertise because of how he conducted himself as a witness. It seemed to us that he wanted to give damning evidence at all costs that would ensure that Telkom was found to have been non-compliant.

[71] We also don't understand why Mr Maulana gave evidence on the supplementary report of May 2011 when Telkom's charge related to the 2009/2010 reporting period. We find this inexplicable indeed.

[72] The percentages indicated in the reports were averaged over a period of six months which process is not congruent to the provisions of the Regulations. The Regulations required the fault clearance to be averaged in three days and six days.

Evidence-in-chief – Mr Bethuel Makola

[73] ICASA called Mr Makola, Manager Regulatory Affairs and Drafting as its second witness.

[74] Mr Makola read Regulation 7 which deals with penalties. This Regulation stipulates that a licensee who was found to be non-compliant by the CCC would be liable to a fine not exceeding R500 000 for a contravention of Regulation 4.9(a) and 4.9(b) and R150 000 for contravening Regulations 5 and 6. It also provides for additional R50 000 for every repeated offence.

[75] He said if a licensee was found guilty of contravening Regulation 4 by the CCC, it would be liable to a fine not exceeding R500 000. He said the whole of Regulation 4, from 4.1 to 4.9, would attract a fine not exceeding R500 000 in the event of a contravention.

[76] Responding to a question from Ms Kruger, Mr Makola said for each six months of contravening the Regulation, there would be a charge and a licensee would be liable to a penalty of R500 000.

Cross-examination by Mr Semenya SC

[77] Mr Semenya asked Mr Makola what ICASA considered to be a contravention and Mr Makola's response was that he could only assume that if one had not complied with the provisions of Regulation 4.

[78] Mr Semenya asked what was compliance with Regulation 4 to which Mr Makola asked him to elaborate.

[79] After a brief exchange of words, Mr Makola said compliance was when you complied with the Regulations.

[80] Mr Semenya then asked if Regulation 7 sought to penalise up to R500 000 per contravention of Regulation 4. Mr Makola replied "yes, 7(a) yes"

[81] Mr Semenya wanted to know what ICASA considered to constitute a contravention of Regulation 4. Mr Makola responded by saying "If you are asking for a formal ICASA position, I'm not at liberty to give you ICASA's position.

[82] Mr Semenya asked for the reason for not being at liberty to give him ICASA's position.

[83] Mr Makola then asked "The reason?''

[84] At this stage Senior Counsel asked Mr Makola as to why he was disinclined to assist the CCC. Mr Makola responded by saying that he did not have the authority to actually communicate ICASA's position. He said the person who had the authority was "in Council.''

[85] Mr Semenya asked if Mr Makola had any knowledge as to how the Regulations were applied. He said he did not apply them. Elaborating, he said if a division had issues or they had problems interpreting the regulations, they would assist in interpreting them, meaning applying the relevant legal principles.

[86] Asked if he would know how they would apply Regulation 4.9(a) he said Senior Counsel should ask the relevant division.

Re-Examination

[87] During re-examination, Mr Makola said Regulation 4.9 is a sub-regulation of Regulation 4. Ms Kruger then asked him to read Regulation 6 which he did.

Evaluation of Mr Makola as a witness

[88] Mr Makola was called to give evidence on how he interpreted Regulation 7 which dealt with penalties.

[89] Mr Makola was defensive in answering Senior Counsel's questions. When Senor Counsel asked him a question, he would reply by asking a question. He tried to avoid answering questions by saying it was somebody else who could answer that question, and not him.

[90] Be that as it may, Mr Makola's evidence would have become relevant if the CCC had found Telkom to have failed to comply with the provisions of Regulation 4.9(a) and (b). In short, Mr Makola did not assist ICASA's case.

Mr Gumani Malebusha – evidence-in chief

[91] Mr Malebusha was the third witness to testify on behalf of ICASA. He introduced himself as the Complaints Officer at Consumer Affairs.

[92] In the main, his evidence was that his job was to receive complaints which had been lodged with licensees but had not been resolved. These complaints were then escalated by consumers to them.

[93] He said a complainant would first report a complaint to a licensee and if he was not satisfied, the complaint would be escalated to ICASA for intervention. ICASA would then relay the complaint to the relevant licensee for a response. Mr Malebusha said they dealt only with escalated complaints.

[94] Ms Kruger reminded Mr Malebusha that the period we were at the hearing for was 2009/2010. She then asked him to provide "specific examples where the consumers had serious complaints against Telkom that were the consumers had serious complaints against Telkom that were raised with your division."

[95] Mr Malebusha's reply, "well, I think it will be may be with regard to those cases that were received, but they were not resolved may be within the

turnaround times. So there will be a list that I have had of those complaints."

[96] At this stage Ms Kruger wanted to refer to a document dated 16 August 2010 but Mr Semenya objected, saying that the document was not relevant.

[97] After hearing Ms Kruger's argument to show the relevance of the document, the CCC ruled that it was inadmissible as it was not relevant to the issue at hand.

[98] Finally, Mr Malebusha said if there was a contravention of Regulation 4.9, the consumers would not receive a good service.

Cross Examination by Mr Semenya SC

[99] Mr Semenya had no questions for Mr Malebusha.

Re-examination

[100] In re-examination, Ms Kruger wanted to know the impact of contravening Regulation 4.9 on consumers. Mr Malebusha said it could be that the customer won't be receiving service. He said customers won't be enjoying the benefits of service paid for.

Evaluation of Mr Malebusha as a witness

[101] Mr Malebusha's evidence was of no consequence at all and we wonder why he was called in the first place. He seemed uncertain about what he was talking about. Despite being asked to give specific examples of serious complaints against Telkom, he could not elaborate. He used words like "may be" an indication that he was not sure of what he was talking about.

[102] He spoke about cases that were not resolved within the turnaround times. He did not tell the hearing what he meant by "turnaround" times.

[103] Senior Counsel advisedly did not cross-examine Mr Malebusha. We reject his evidence because it was unreliable and did not assist the CCC.

Evidence-in-chief – Mr Eric Nkopodi

[104] Mr Nkopodi testified that he was a Senior Specialist in Engineering and Technology. He said his position was at a managerial level. He said his department was responsible for spectrum monitoring and control, looking specifically at quality of service and networks.

[105] He pointed out that quality of service is the degree to which the customers were given satisfactory service by service providers. In doing their work, they were guided by the End-User Service Charter and recommendations made by ITU.

[106] Responding to a question from Ms Kruger, Mr Nkopodi said it would be unfair of Telkom to say it could not meet the requirements of Regulation 4.9 because of copper-related problems as there were various technologies that one could use to deliver services to customers. He said copper was used mainly in the networks and from his "little knowledge,'' he knew that networks were usually designed in such a way that if one path was disconnected, the other path should take over.

[107] He pointed out that according to ITU recommendations, you should have protection for whatever link you were planning. Also, from the revenue point of view, it would be unsafe for a company to have only one path, using one technology, i.e. copper, for its connections.

[108] Elaborating on the above, Mr Nkopodi said most countries were moving away from copper to technology called MSAN, which is Multiple Service

Access Nodes. He said he understood Telkom to be in the process of rolling out this technology. He pointed out that this technology would give one the capability which was even better than copper in order to protect their networks.

[109] Mr Nkopodi said copper was not an issue because there were alternative technologies that could be used to replace or to respond quicker to their customers in order to address the issue of disconnections.

Cross-examination by Mr Semenya SC

[110] Responding to a question from Senior Counsel, Mr Nkopodi admitted that copper was a problem in that it was susceptible to theft, vandalism and inclement weather. Excavations could also interfere with its reliability.

[111] Mr Nkopodi said in the past, a fixed-network was distinctly different from a wireless network but now neutral devices started to be compatible with one another. Clear distinction was no longer relevant these days. So the platforms are made to be interoperable with one another. He conceded though, that a fixed-line network had its own characteristics and that a wireless network had its own. The medium of transmission was not the same.

[112] He also admitted that the medium of transmission in fixed-line which was copper, held various opportunities for fault, theft, etc. But to have a sound network, you should be able to consider all these possible disruptions and have a protection mechanism or preventative measures.

[113] Mr Semenya put it to Mr Nkopodi that Telkom had 4 million subscribers on voice. Mr Nkopodi said he "could" agree with this statement.

[114] Mr Semenya further put it to Mr Nkopodi that it was inconceivable to put protection for 4 million connections and Mr Nkopodi's response was that it would depend on which part of the network the protection was put.

[115] He pointed out that you should have protection in the core network and not for each voice-connection as suggested by Mr Semenya.

[116] Interrogating him further, Mr Semenya said that did not help Telkom from other intermittent stages where the fault could occur on a fixed-line network.

[117] Mr Nkopodi said a fault could occur on a fixed-line network, perhaps on the access side of the network but he said he had indicated that if it was on the access side of the network, the response time could be shortened by various technologies. It was unfair for Telkom to say it could not give its customers access now because of copper theft, "because it was the issue of prioritisation." He said usually Telkom prioritised bigger clients compared to individuals, which was unfair. He said all customers should be treated equally.

[118] On being pressed further with questions, Mr Nkopodi explained that network was at various levels. A network site should have a protection. The access part, perhaps from the manhole to someone's house, could not have protection.

[119] He said even in these circumstances, something could still be done to assist a complainant. He said the main copper was usually used between the exchange and the manhole. He said that was the part that the criminals were targeting and advised that, that path that you could protect by various ways.

[120] He conceded that you could not protect each individual voice- client at certain points. He also conceded that there were some points where an opportunity for fault could emanate.

[121] Mr Nkopodi admitted that migration from fixed line to new generation could take a long time and that it was very expensive.

[122] He admitted that there was a shortage of skilled people in telecommunications in the country and that even in coming years, there was going to be a need to continue skilling people.

[123] Mr Nkopodi admitted that there was no company in the world that had a redundancy protection on voice, on the access portion of the network.

Re-examination

[124] Under re-examination, Mr Nkopodi testified that the Regulations related to fixed-line, voice, wireless and mobile. Ms Kruger asked Mr Nkopodi if it would be correct to say that the hearing was about Telkom's contravention of the Regulation pertained only to voice or fixed-line. His explanation was that the end-user had "various parameters or regulations" and it would depend which parameter or section of the regulation Telkom contravened that necessitated the hearing.

[125] Still under re-examination, explaining the concept, core protection, he said on the core network, you can have "various protection". He explained that the first protection or the base would be protection of a similar technology. He said the second point might be the configuration of the network itself because the nodes somehow are interlinked. He said if a path was not working, then the other would take over and so would the different technologies. He added that you might have optic fibre as a

back-up or you might have wireless links as a back-up between various stations. He said all of these would constitute protection.

In these circumstances, Telkom could not use the copper problem as an excuse because that would have lots of revenue implications for their side.

Evaluation of Mr Nkopodi as a witness

[126] Mr Nkopodi was a good witness. We found him to be a reliable witness who was prepared to make concessions even in instances which favoured Telkom. We accept Mr Nkopodi's evidence although it did not remedy the flaws that are mentioned in this judgment. For his part, he did what he could but could not salvage ICASA's case. He did flounder once or twice but did not detract from a good performance.

[127] As Mr Nkopodi was ICASA's last witness, Ms Kruger announced that she was closing ICASA's case.

Mr Norman Reyneke's evidence-in-chief

[128] At this stage, Telkom was afforded the opportunity to state its case whereupon Mr Semenya called Mr Norman Reyneke as their first witness.

[129] Mr Reyneke has been working for Telkom for 35 years. He has worked in different departments and now he was working in the Business Intelligence Department which was part of the IT Department.

[130] He started as a technician mainly in the data services side. His work entailed the repair and installation of data services for customers. From there he went to Head Office where he was a Manager in the Service

Management Division. He took care of "customers, corporate customers", mainly the main government departments.

[131] His next area of work was business intelligence which he has been doing for eight years. This section gathered data from various data sources of the computer systems within Telkom mainly to produce management reports. He also dealt with data capturing in relation to faults.

[132] He explained the process being followed to track faults. He pointed out that they had various electronic systems for fault management for the various product groupings, e.g. voice, ADSL, data services, high speed which they called mega line services. They had satellite services and each one was handled by its own individual area of responsibility.

[133] He said faults over a period of a year tended to increase dramatically in the northern region, the northern half of the country during summer months. This was mainly due to increased weather activities, storms, etc.

[134] In the southern regions in the winter months when they had their rainy season, there would be an increase in faults as well.

[135] He did not know how Telkom addressed seasonality as that was not his area of expertise but he was aware that Telkom would send technicians around on a regular basis to supplement staff shortages where faults had increased.

[136] Once a fault was resolved, "a clear code'' was entered into the system by a call centre agent and the fault was then logged in the system as closed and resolved.

[137] Some faults were resolved remotely by a call centre. Technicians were sent to faults which could not be resolved remotely,

[138] Telkom's network was spread throughout the country and sometimes Telkom sent technicians to remote areas of the country for fault resolution.

[139] Mr Reyneke confirmed that he was aware that in terms of Regulation 4.9(a), a licensee had to clear up to at least 90% of faults reported within three days.

[140] He said a fault that remained not cleared, would remain on the system until it was cleared. A fault that remained uncleared by day 10 would still be captured in the same way like any other fault. The fact that it was cleared within 10 days would be reflected in the calculations when the data was extracted.

[141] At this stage Senior Counsel referred Mr Reyneke to a document on page 31 of Exhibit 1, outlining the Telkom supplementary report which Mr Reyneke said covered the period April 2010, October 2010 and April 2011. Mr Reyneke said at the time of drafting the supplementary report, Telkom did not have any indication from ICASA how the report needed to be packaged. Telkom drew up the report out of its own accord. In terms of the Regulations, however, ICASA was suppoesd to determine the format which the licensees were obliged to follow.

[142] Mr Reyneke confirmed that although Telkom, in its report on page 31 of Exhibit 1, stated that the report followed the format submitted to the Authority on 20 January 2010 and again on 26 February 2010, Telkom never received a response from ICASA indicating whether the format was a proper one.

[143] Mr Semenya referred Mr Reyneke to Regulation 4.9(a) and drew his attention to the calculation of faults. Mr Reyneke agreed that the

Regulation required a licensee to indicate the percentage of faults cleared within three days as an average.

[144] Senior Counsel once again referred Mr Reyneke to a notation in the report. It read

> *"Note: Faults not cleared during a reporting period will be carried over to the next reporting period."*

[145] His explanation for this was that the reporting that they did was only on faults that had been cleared. If a fault had not been cleared, it would be carried over to the next reporting period. He said if by month six they had faults that were reported but not cleared, they carried them over. He said to their knowledge, Regulation 4.9(a) did not authorise this practice. He said in terms of their systems, if that fault remained unresolved, it was never captured.

[146] All the faults that had not been cleared within three days were aggregated over a period of six months and this was not authorised by Regulation 4.9(b).

[147] Senior Counsel then referred Mr Reyneke to the second report on page 40 of Exhibit 1 which covered the period 1April 2010 to 30 September 2010 which was the second six months of that calendar period.

[148] Mr Reyneke told the hearing that on average, the number of voice faults captured in a year was over two million. He testified that his department was requested to obtain over a test period what number of days it would take Telkom to clear bulk volumes of faults. He said it took Telkom over 120 days to get a 90% clearance rate.

[149] Mr Semenya directed Mr Reyneke to Exhibit 4 which was the calendar month of October 2009 and asked if the CCC would be able to see how

many faults were reported in the first three days of that calendar month. Mr Reyneke responded, "no.''

[150] Senior Counsel then asked if the CCC wanted to know what average of the faults reported in the first six days was achieved in the month of October, would it be able on the face of the report to have that information. Again the answer was "no".

[151] The CCC would also not know what fault-reporting was done to Telkom even if it wanted to by each and every cycle of three days and the same thing applied for every cycle of six days. All that happened was that Telkom just ran all the numbers, averaged them over a period of six months.

[152] Telkom did not have the opportunity to know whether in fault-clearance reports it needed to capture faults occasioned by sabotage. Telkom also did not know whether to include faults occasioned by copper theft or inclement weather. The report did not show in any manner whether or not Telkom technicians were denied access to clear a particular fault within a particular timeframe,

[153] In calculating days, Telkom followed the ECA which stated that those would be working days. If a fault was reported on a Friday, Telkom would only start calculating from Monday, according to the ECA.

[154] Copper played a major role in the incidence of faults, especially in voice faults categories and ADSL categories.

[155] Responding to a question from Mr Semenya, Mr Reyneke confirmed that if Telkom was delinquent, it could easily have inserted 90% or 100% in any of their reports but as a law-abiding corporate citizen, the information Telkom gave was accurate.

[156] Most businesses would close over December holidays and when they came back to open, there would be a sharp "spike'' of the reports, as a result of fault-reporting that might have happened during the December holidays.

[157] Telkom was bound by the Labour Relations Act in relation to its employees in the sense that they too, should have their statutory holidays.

Cross-examination by Ms Kruger

[158] Responding to Ms Kruger's question, Mr Reyneke stated that the information in the reports on pages 31 and 40 of Exhibit 1 was crafted by his division and the final submission and compilation was done by their Legal and Regulatory Department.

[159] Ms Kruger asked if; not having a format to work from was prejudicial to Telkom, and Mr Reyneke answered in the affirmative. He said in the absence of a format, they were not sure exactly what ICASArequired from them.

[160] Ms Kruger wanted to know why they went ahead and submitted the reports to ICASA and not insist on ICASA to provide them with a format. Mr Reyneke's reply was that he was only asked to provide the information. He did not make a final decision as to whether it should be submitted or not.

[161] Mr Reyneke was referred to Regulation 6(d) and was asked where in the Regulation did it say that ICASA needed to prescribe a format. His response was "nowhere.''

[162] Mr Reyneke re-iterated that to reach a figure over 90% would take in excess of 120 days.

[163] Ms Kruger referred Mr Reyneke to various sections in the ECA and proceeded to ask him if it was fair for Telkom to discriminate between business subscribers and individual subscribers. His response was that that was not his field of expertise. However, when Ms Kruger insisted that she was asking for his personal opinion, he conceded that it was not fair to discriminate against anybody.

[164] Mr Reyneke said since working for Telkom 35 years ago, seasonal patterns had changed in "verbosity'' but not really "in time spans". The seasons remained the same and the Christmas holidays have always been the Christmas holidays. He said when he started at Telkom, labour legislation was not as it was today but there was some form of labour relations and people always took leave.

Re-examination

[165] Responding to a question from Mr Semenya, Mr Reyneke said to his knowledge, Telkom never discriminated against anybody.

[166] Responding to a question from the Chairperson as to whether Telkom asked for a format from ICASA, Mr Reyneke said to the best of his knowledge, their Legal Department submitted requests from ICASA but there was no response.

Evaluation of Mr Reyneke as a witness

[167] Overall, Mr Reyneke was a good witness. He gave a clear picture of the short-comings in Regulation 4.9 and how impossible it was to try and comply with its provisions.

[168] He was prepared to make concessions. For example, when cross examined by Ms Kruger as to where in Regulation 6(d) was it said the

Authority needed to determine a format, without hesitation, he replied, "nowhere". He did not think of an answer that would advantage Telkom.

[169] When he did not know an answer to a question, he did not try to cover up for Telkom. He would unhesitatingly say "I don't know".

[170] He has a wealth of experience in the telecommunications industry and knew what he was talking about.

[171] It is true that when he was questioned by Ms Ntanjana about the 120 days it would achieve a 90% clearance rate, he stumbled. His evidence was, notwithstanding this blot, plausible and therefore acceptable.

Mr Chris Newton's evidence –in-chief

[172] The next witness for Telkom was Mr Newton who testified that he had been working for Telkom for 35 years in various capacities. He has worked in the switching/planning environment, worked in the quality control environment, the demand forecast environment and at the present moment he was working in the old access technology replacement programme in the Network Infrastructure Provisioning Division.

[173] Mr Newton was responsible for the old access technology replacement and copper decommissioning project. He was also responsible for mobile back-call and master-planning with 8ta as well.

[174] He said although he was not sure how old the fixed network was, he assumed that it was about 40 to 50 years old. He said at the moment, on the voice part of the network, they had a 3-layer type of network. They had an access portion, an edge portion and a core portion of the network.

[175] He then proceeded to describe each portion as follows:

the core portion was made up of DPSUs, which was a digital primary switching unit. The edge portion was made up of the DSSUs, which were digital secondary units. The access portion was made up of concentrators to which the subscribers were connected.

[173] The rationale for decommissioning was to replace old copper technology with wireless type of technologies or with fibre boxes which were closer to the customers. Because in today's world customers are more bandwidth-hungry, they actually wanted to deploy technology to the customer that could actually handle the bandwidth type of technology. That was why fibre was deployed closer to the customer.

[176] When you had fibre closer to the customer, you could offer the customer a larger bandwidth capability. A customer could also use completely different types of services to what he was using now. He could have video-on-demand and data services, voice all into one type of technology with using fibre.

[177] Copper was more susceptible to lightening, weather conditions like water. Copper was also susceptible to theft and everybody knew that. Because a lot of their cable was run aerially in the last mile to the customer, "that cable is susceptible to theft where fibre was run to a street box, which was run underground.'' He said they did not have fibre right up to the customer at the present moment, and people didn't really steal fibre cable.

[178] Mr Newton said redundancies were in place in the core environment where they had self-healing routes between their different elements of the network. There was a sort of redundancy in the edge network as well. There was redundancy, if you looked at their concentrators. If you were

looking at the backhaul of the exchange, there would be redundancy in the backhaul to the main, to the edge which was the DSSUs, but there was no redundancy from the actual concentrator to the subscriber and that was where the copper cable was actually run. He testified that he did not know any service provider in the world that had that type of redundancy.

[179] He said Telkom concluded agreements with the big consumers with a greater capacity for redundancy built in the agreement. The big consumers made additional payment for this kind of arrangement. It was not necessarily feasible to do a redundancy for access of remote clients because Telkom would have to put another copper line as well which did not make technical sense. It would also be cost intensive for the customer to have a redundant circuit as well.

[180] Moving a network from one technology to another was not done in a very short period of time. At Telkom they did things like the IRRs, i.e. internal rate of return. Technicians have to be retrained on a newer technology. It was not realisable in a short space of time.

[181] Mr Newton was busy with old access technology replacement programmes. This would assist in the rural environment because Telkom's cable-runs were long. It took a technician a long time to actually go and find the fault and to actually go to the customer.

[182] To prevent copper theft, they could "alarm'' the manholes. They could seal them. Telkom was actually entrenching the cables into the ground instead of having them running overhead and they were also entrenching the pipes into the concrete.

Cross-examination by Ms Kruger

[183] Ms Kruger pointed out that Mr Newton was present in the hearing and asked him whether Telkom was compliant with Regulation 4.9(a) and (b). Mr Newton replied that he was unable to answer that question as it was not part of his work.

[184] Responding to Ms Kruger's question Mr Newton said most of the copper got stolen when it was aerial and not in the ground because it was more accessible. This would happen at the access point.

Re-examination

[185] There was none

Evaluation of Mr Newton as a Witness

[186] Mr Newton was a good and reliable witness. He is an experienced person who has worked for Telkom in different capacities for a long time. He corroborated Mr Reyneke in material respects.

[187] He also enlightened the hearing about Telkom's operations, its challenges and how Telkom intended to enhance its technology to adequately meet the needs of its customers.

[188] We accepted Mr Newton's evidence.

Mr Thamsanqa's Kekana's evidence-in-chief

[189] The next witness to be called was Mr Kekana who is the Executive Regulatory Law within the Regulatory Affairs Division. Mr Semenya referred Mr Kekana to the April report, on page 31 of Exhibit 1.

[190] He asked Mr Kekana whether there was anything in the Regulations telling us that the days (mentioned in Regulation 4.9(a) and (b)) were ordinary days or business days.

[191] Mr Kekana's reply was that Regulation 3 stipulated that unless the context indicated otherwise, a word or expression to which a meaning had been assigned in the ECA, had a meaning as assigned. Because the definition of days existed in the ECA, they calculated the three days and the six days in Regulation 4 to exclude Saturdays, Sundays and public holidays.

[192] Responding to a question by Senior Counsel, Mr Kekana pointed out that from a plain reading of the Regulations, there appeared to be nothing authorising carrying over faults not cleared.

[193] Mr Kekana, in response to Senior Counsel's question, said where the figure 75.85% appeared in the report, he could not readily tell how many faults were reported, on the face of the report.

[194] Mr Semenya asked whether the absolute number which would be reflected as the difference between the required 90% and the actual performance rates, was reflected in the document and Mr Kekana's reply was that it was not reflected. He added that they were not able to know how many faults had been cleared in terms of the report. He added that it was not evident from the report how many faults had not been cleared.

[195] Mr Kekana added that the CCC would not be able to determine which faults had not been cleared at which time apart from over the period of six months. He also said the CCC would not be able to discern, on the face of the report why compliance was not possible at a particular period.

[196] Responding to Mr Semenys's question, Mr Kekana said if non-compliance was not capable of being discerned clearly from the

document, he did not think that it was possible to levy a penalty to reflect the degree of non-compliance.

[197] Mr Kekana confirmed that the regulation as read at the hearing, you averaged three days in respect of the first 90% and for the remaining part you averaged over six days. Responding to Senior Counsel's question, Mr Kekana pointed out that his interpretation of Regulation 4.9(a) was that the average of 90% in terms of fault clearance pertained to three days and not over a period of six months.

[198] Mr Semenya told Mr Kekana that the evidence had already been tendered that the report was compiled in the absence of a determination of a format by ICASA. He also told him that attempts had been made to engage ICASA to agree to a format. Mr Kekana was aware of those attempts and advised that he was not aware of any positive response from the Authority.

[199] Responding to Senior Counsel's question, Mr Kekana pointed out that going back to Regulation 7, it was not readily clear the basis upon which a penalty would be imposed in relation to a contravention because, as he put it, he thought it was simply because a contravention was not clearly defined in the regulation.

Cross-examination by Ms Kruger

[200] Under cross-examination, he had said there was no definition of what a contravention was in the Regulations. He said he was in no better position than Ms Kruger to determine what a contravention was.

[201] On being asked where he got clarity from in the absence of a definition in a document, he said a dictionary was a "pretty'' good departure point.

[202] Ms Kruger asked what was a fault and Mr Kekana responded by asking whether Ms Kruger was asking him in relation to a specific definition of a fault, in relation to the Regulations or the ordinary meaning of the word.

[203] When Ms Kruger said she wanted the definition as per the Regulation, Mr Kekana's reply was, "Well, the definition is clearly set out in Regulation 3."

[204] Ms Kruger asked if 9 sub-regulations would be part of Regulation 4 and Mr Kekana responded, "If they are sub-regulations, then they are, yes."

[205] Ms Kruger reminded Mr Kekana that he said they did not receive positive feedback and she asked if they received a negative response on the format. Mr Kekana provided context to his description of a positive response. He said the positive response would be, yes it was acceptable and that that was the format ICASA required Telkom to report on.

[206] Ms Kruger put it to Mr Kekana that from a proper reading of Regulation 6(d), it was clear that the Authority "may" determine and not "must" determine, otherwise the Regulation would have read "it must determine a format from time to time."

[207] Ms Kruger put it to Mr Kekana that the interpretation of Regulation 6(d) was an issue which had been canvassed extensively during the hearing. She said a proper reading of Section 6(d) meant that the Authority may determine and must determine.

[208] In response to a question from the Chairperson whether Ms Kruger wanted a reply, Ms Kruger indicated that it was up to Mr Kekana to respond. Mr Kekana said it appeared as if it was a proposition that Ms Kruger held," a view that's the interpretation". He said if she was

requesting him "to assist her in a proper interpretation, I'm quite happy to do that.''

Re-examination

[209] Mr Semenya wanted confirmation that Mr Kekana's evidence in relation to this report applied with equal force to the supplementary report and the September report. Mr Kekana confirmed.

Evaluation of Mr Kekana as a witness

[210] Mr Kekana was a credible and an intelligent witness but his demeanour, towards Ms Kruger, during cross-examination was not acceptable. He did not want to answer questions directly. For example, Ms Kruger asked, "Mr Kekana, tell me what is a contravention?'' Mr Kekana, "I think in my response to Counsel I did state that there is no definition of what is a contravention in the Regulations. So I'm not in a better position than you to determine what a contravention is.''

Ms Kruger proceeded and asked Mr Kekana, "What is a fault?'' Reply, "Are you asking me in relation to a specific definition of a fault in relation to the Regulations or the ordinary meaning of the word?''

[211] Ms Kruger, "No, the definition as per the Regulation." Mr Kekana, "Well, the definition is clearly set out in Regulation 3".

[212] It was not clear to us why Mr Kekana treated Ms Kruger this way.The Chairperson and the CCC members should have called Mr Kekana to order. We should be alert to conduct of this nature in future as it may disorientate Counsel, especially inexperienced Counsel.

[213] Mr Kekana knew fully well that the inquiry was about faults in terms of the Regulation but when asked to define a fault, he chose to be lost as to whether it was in relation to a specific definition or the ordinary meaning of the word.

[214] We found this disturbing, considering that Mr Kekana himself is a lawyer who knows the kind of demeanour expected of a witness in inquiries of this nature. Ms Kruger was very courteous towards Mr Kekana and we don't understand why Mr Kekana chose to treat her the way he did.

[215] In spite of these comments, we accept Mr Kekana's evidence. He corroborated the evidence of Mr Reyneke and, apart from his demeanour; it was a pleasure listening to him especially in his evidence-in-chief. He replied intelligently to questions put to him by Mr Semenya and we welcomed that.

Conclusion

[216] As pointed above, in our opinion, ICASA's failure to determine the format is a fatal flaw which destroyed its case against Telkom.

[217] Telkom had every opportunity to mislead ICASA by putting in the correct percentages that are prescribed by the Regulations so as to appear compliant but it did not do so. ICASA would not have detected this because, in the words of Mr Maulana, they depended on the information given by the licensees and had no way of verifying the accuracy of the reports. This is a demonstration that Telkom had every intention to abide by the law but was frustrated in its endeavours by ICASA's failure to respond to its cry for a standard format.

[218]Evidence before the CCC which stands without rebuttal is that the information in Telkom's reports was incorrect but this was not done to

mislead ICASA. The errors were made *bona fide* and, by the way, this did not prove that Telkom was non-compliant. The evidence of fault clearance percentages were percentages averaged over six months, a process not authorised by the Regulations; do not reflect the faults not cleared, a practice inconsistent with the terms of the Regulations. Faults that were not cleared were carried over to the next reporting period. This too was not sanctioned by the Regulations. The reports did not reflect faults not cleared in the reporting period and this was direct contradiction of the Regulations.

[219] Another piece of evidence which has not been rebutted relates to the test which Telkom did to test how long it would take to get a 90% clearance rate. According to Mr Reyneke, it would take in "excess of 120 days." This effort on the part of Telkom is a clear illustration of how Telkom wanted to meet the requirements of Regulation 4.9(a) and (b).

[220] The difficulty that confronts the CCC is that since non-compliance is not capable of being discerned clearly from the reports, it is not possible to consider to levy a penalty that is consistent with the degree of non-compliance.

[221] We accept the evidence led on behalf of Telkom. The witnesses corroborated each other, especially on key areas, like the requirements of and how Telkom interpreted Regulation 4.9(a) and (b). They also corroborated each other on the efforts they made to get a reaction from ICASA about a format. Both Mr Newton and Mr Reyneke made concessions which did not favour Telkom.

[222] We reject Mr Maulana's evidence for the reasons given earlier in the judgement. Mr Makola's evidence was not helpful as it was mainly about the interpretation of Regulation 7 which deals with penalties. We

do not propose saying more because the question of penalties does not arise as, in our view, ICASA has failed to prove non-compliance on the part of Telkom on a balance of probabilities.

[223] Mr Malebusha did not assist ICASA's case, one way or the other, and it was not surprising that Mr Semenya did not find it necessary to cross-examine him. We found Mr Nkopodi to be a good witness. He was prepared to make concessions even if they were favourable to Telkom. He struck us as an honest witness who was telling the truth. His evidence did not bolster ICASA's case as his evidence could not cure serious shortcomings - for which he was not responsible – like failure to determine a format, and the whole saga around the calculation of clearance percentages.

[224] In terms of section 17B of the ICASA Act, the CCC may make any recommendation to the Authority necessary or incidental to the performance and functions of the Authority in terms of the ICASA Act or the underlying statutes or to achieve the objects of the ICASA Act and the underlying statutes.

Recommendations

[225] Pursuant to the above, we recommend that:

- The Authority determines and makes available a standard format to all its licensees. Licensees should be afforded the opportunity to study the format so that they can raise any issues they might have. This will ensure that there is a common understanding of the Authority's requirements between the Authority and its licensees.
- The Regulations as they stand, are problematic and are not capable of implementation and Telkom has approached the High Court to challenge their validity. To avoid costs associated with litigation

and negative publicity, we advise that the Authority considers engaging Telkom with a view that it stops its Court action with an undertaking that the Authority will review the Regulations.

- Since there is a potential for the referral to the CCC of more cases of non-compliance by licensees, we recommend that the Legal Division gives potential witnesses basic training on what is expected from a witness and how they should conduct themselves in a hearing.
- ICASA's witnesses must present evidence regarding the nature and gravity of non-compliance, the consequences of non-compliance, the circumstances under which non-compliance occurred, the steps taken by the licensee to remedy the complaint and the steps taken by the licensee to ensure that similar complaints will not be lodged in future.
- Without the foregoing given as evidence to the CCC, it will not be possible for the CCC to make a meaningful recommendation on the remedial steps to be taken to prevent a recurrence. The Legal Division can be an invaluable resource in this regard.

[226] If ICASA is considering bringing other licensees before the CCC on similar charges like Telkom, we urge the Authority to suspend them until the Regulations are reviewed.

JW Tutani **Date.....October 2012**

Chairperson

Members : Tlokana, Batyi, Ntanjana and Ramuedzisi concurred with the above judgment.