

SOUTH AFRICA / JUDGMENT

Multichoice Africa (Pty) Ltd v National Consumer Commission (NCT/3220/2011/101 (1)(a)(P)) [2012] ZANCT 4 (23 March 2012)

[2012] ZANCT 4

COURT

National Consumer Tribunal

BEFORE

J Maseko, D Terblanche, N Sephoti

CASE / FILE NUMBER

NCT/3220/2011/101 (1)(a)(P)

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IN THE

NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

No: NCT/3220/2011/101 (1)(a)(P)

Date: 23/03/2012

IN

THE MATTER BETWEEN:

MULTICHOICE

AFRICA (PTY) LTD

.....Applicant

And

THE

NATIONAL CONSUMER COMMISSION

.....Respondent

CORAM:

MASEKO

J.M. (PROF.) (PRESIDING MEMBER)

TERBLANCHE

D. (MS.) (MEMBER)

NEO

SEPHOTI (ADV.) (MEMBER)

Date

of Hearing: 28 February 2012

Date

of Ruling: 19 March 2012

RULING**AND REASONS****The Applicant**

1.1 The Applicant, Multichoice Africa (Pty) Ltd (Applicant), is a company with limited liability and registered as such in accordance with the Laws of the Republic of South Africa under registration number 1994/009083/07 with its principal place of business at 251 Oak Avenue, Randburg.

1.2 Applicant provides a subscription broadcasting service in accordance with a subscriber broadcasting service license issued to it by the Independent Communications Authority of South Africa (ICASA).

The Respondent

2.1 The Respondent is the National Consumer Commission (Respondent); a public entity, established by section 85 of the Consumer Protection Act No. 68 of 2008 ("CPA"). The Respondent's principle place of business is at Berkley Office Park, 08 Bauhinia Street, Highveld Technopark, Centurion.

2.2 The Respondent is mandated to perform functions in terms of the CPA more specifically those set out in sections 92 to 98 of the Act.

Jurisdiction

3.1 The National Consumer Tribunal (Tribunal) has jurisdiction to hear this matter in terms of section 101 of the CPA.

3.2 This section empowers the Tribunal, to confirm, modify or cancel all or part of a compliance notice.

Background

4.1 The hearing is consequent to the Applicant objecting, in terms of section 101(1) of the CPA, to the compliance notice issued by the Respondent against it on 13 October 2011 in terms of section 100(1) of the CPA. The matter was set down for a full hearing on all the grounds of objection raised to the compliance notice.

4.2 This ruling pertains to the issues raised in limine at the start of the hearing. The parties agreed to address these issues at the outset of the hearing and further agreed that if the Tribunal finds in favour of the Applicant, such finding would dispose of the matter in its entirety.

The issues raised in limine to be decided are whether the -

Respondent consulted with the regulatory authority that issued the license to the Applicant, a regulated entity, before issuing the compliance notice in terms of section 100(1) of the CPA as required in section 100(2) of the CPA. The relevant sections provide as follows:

“100

- (1) Subject to subsection (2), the Commission may issue a compliance notice in the prescribed form to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct.”

“100

- (2) Before issuing a Compliance Notice in terms of subsection (1) to a regulated entity, the Commission must consult with the Regulatory authority that issued a license to that regulated entity.”

5.2 The compliance notice set out, as required in section 100(3)(e), the “details of the nature and extent of the non-compliance.”

It is common cause between the parties that -

The Applicant is a regulated entity as envisaged in section 100(2) of the CPA.

The relevant regulatory authority required to be consulted in terms of section 100(2) is the Independent Communications Authority of South Africa (ICASA).

The provisions of section 100(2) are peremptory and a compliance notice issued without meeting the requirements of section 100(2) would render such compliance notice fatally defective.

If the Tribunal finds that the Respondent did not meet the peremptory obligations imposed on it in terms of section 100(2) of the CPA, the compliance notice falls to be set aside.

That a meeting was held between the Respondent and ICASA on 22 August 2011.

The Minute of the meeting contained in page 302A et seq of the record is the Minute of the meeting above.

7 The Applicant took the Tribunal through its various submissions in respect of section 100(2) below culminating in its concluding

submission that the Respondent did not consult with ICASA as required, before the Respondent issued the compliance notice.

There is an obligation on the Respondent to consult with the Regulatory Authority, ICASA, in terms of section 100(2) as Applicant is a regulated entity as defined in the CPA;

It disputes the Respondent’s assertions that the compliance notice was issued after the required consultation with ICASA;

Respondent failed to meaningfully respond to Applicant's requests for information and documentation to enable it to meaningfully respond to the Respondent's assertions that it (the Respondent) had complied with section 100(2);

In Applicant's letter dated 19 January 2012 to Respondent it specifically requested information about the meeting of 22 August 2012 such as – the purpose, agenda, attendees, discussions, outcome and whether a minute was prepared; and

The Respondent's legal representatives responded in writing to the Applicant stating that the purpose of the meeting was, amongst others, to discuss issues relating to the ICT sector and open broadcasting systems, that there was no formal agenda to the meeting, who was present at the meeting and that the minutes of the meeting can be obtained from ICASA.

The minute above was filed under cover of Applicant's supplementary replying affidavit, after it obtained the Minute from

ICASA. This Minute was submitted and admitted into evidence by agreement between the parties.

Applicant contended that –

The purpose of the meeting was to obtain ICASA's views on its consultation with various major players within the ICT sector which included the Applicant, but did not constitute consultation with the Applicant.

The content of the Minute shows that there was no consultation about the Applicant, nor was there any debate about the Applicant, hence the requirements of section 100(2) were not met. The Minute reflected that -

The Commissioner indicated that they had various consultations with the major players within the ICT sector namely Cell C, Vodacom, Telkom, MTN and Neotel, and in the broadcasting space with Multichoice and Top TV.

There was a discussion of the five major players and an assessment of consumer contracts and analyses was undertaken with respect of four of the five major players. Mention by the Commissioner that none of these entities were compliant with the CPA.

That written commitments from these entities were received to amend their contracts with different timelines.

In order to ensure that the commitment is firm and binding the Commissioner had to ensure that the entities signed consent orders. The entities indicated their unwillingness to sign consent orders (with the exception of Neotel).

Discussion about compliance notices for the four unwilling to sign consent

orders.

The Commissioner indicated that they are still in discussions with Multichoice and Top TV on their consumer contracts with no further discussion. End of the discussion clear from page L setting out that "... in conclusion the Commissioner requested to be supplied with copies of the licences of the operators as they would assist the commission to finalise the process as these are critical for arguments with the entities".

Then general discussion and the end of the meeting.

In support of its contention that there was no consultation as required by law, Applicant made extensive submissions to the Tribunal

regarding the meaning ascribed to the word 'consultation' from case law.

Applicant referred the Tribunal to the case of *Hayes and Another v Minister of Housing, Planning and Administration, Western Cape and Others*¹ and from it the various dictionary meanings of 'consult' and 'consultation' as follows:

Shorter Oxford English Dictionary

"inter alia, to take counsel together, deliberate, confer while 'consultation' is said to mean, inter alia, the action of consulting or taking counsel together; deliberation, conference..."

Webster's New Universal Unabridged Dictionary

"1. a consulting. 2. A meeting of persons to discuss, decide, or plan something, while 'consult' in the relevant context means 'to ask advice of; to seek the opinion of as a guide to one's own judgment'

Reader's Digest Universal Dictionary

'consult' is rendered as "to exchange views; confer" and 'consultation' as "1. The act or procedure of consulting. 2. A conference at which advice is given or views are exchanged".

With reference to *Maqoma v Sebe NO and Another*², Pickard, J observed on the meaning of 'consultation'

"The word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."

The learned Judge, quoting from *Port Louis Corporation v Attorney-General of Mauritius*³, quoted the learned Law Lord Morris of Borth-y-Gest on the following principles that pertain -

"The requirement of consultation is never to be treated perfunctorily as a mere formality. The local authority must know what is proposed; they must be given a reasonable, ample and sufficient opportunity to express their views or to point to problems or difficulties; they must be free to say what they think"

10.4 With reference to *Sinfield and Others v London Transport Executive*⁴ Pickard, J quoted as follows on this issue -

“Consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal. I start accordingly from the viewpoint that any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the rights an opportunity to be heard at the formative stage of proposals before the mind of the executive becomes unduly fixed.”

10.5 With reference to *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities*⁵ Pickard, J in Hayes quoted -

“no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation,

of which A consultation is a pre-condition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and genuine receipt of that advice. In my view, it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice.”

(emphasis added)

10.6 With regard to the giving and receiving of advice (referred to in the case above), Applicant contended that there could not have been any question of such as the Respondent did not provide ICASA with an analysis report on Applicant and Respondent indicated to ICASA at the conclusion of the meeting that it is still engaged in interactions with Applicant.

The Respondent submitted that -

There were extensive consultations held between the Applicant and Respondent;

The consultation in terms of section 100(2) in respect of Applicant took place with ICASA on 22 August 2011;

After the meeting with ICASA on 22 August 2011 there were no subsequent engagements with the Applicant (this was disputed by Applicant referring the Tribunal to a letter from Applicant to Respondent on 26 August 2011).

At a meeting of 17th August 2011 both parties were clear they are not in agreement and that the Commissioner was therefore entitled at that point to issue compliance notice.

Despite the recordal in the Minute there was never a single exchange between Applicant and Respondent after 17 of August 2011.

In coming to a decision on this issue the Tribunal started from the following premises regarding the requirement to consult, namely –

It is a peremptory requirement. This is evidenced by the wording “must consult” in section 100(2). If this consultation had therefore not taken place, the failure to do so render the compliance notice vulnerable to cancellation by this Tribunal in terms of section 101(2).

It is for the Respondent to consult with the “regulatory authority that issued a license to that regulated entity”, in this instance ICASA. Respondent’s submissions that there were extensive consultations with the Applicant, is of no consequence in assessing whether Respondent met the peremptory consultation requirements of section 100(2).

It is for the Respondent to consult with the relevant regulatory authority “before issuing a notice in terms of section 100(1) to a regulated entity”. This issue we discuss in more detail below as this is intricately tied up with what consultation means and whether the meeting held on 22 August 2011 evidenced by the Minute and agreed on by the parties, constitute consultation as envisaged by the section.

We now explore the content and extent of the ‘consultation’ the Respondent averred took place. This is contained in the Minute of the meeting held on 22 August 2011 between Respondent and ICASA, contents of which the parties agreed on. Upon studying the Minute we concur with the reading and import of the Minute as set out in detail by Applicant.

14. As section 100(2) is silent on the content of and other requirements to be met for the ‘consultation’ to pass muster, we sought guidance from other potentially relevant provisions of the CPA and case law to interpret the section and determine whether

Respondent met the requirements of section 100(2).

15. We found such guidance in the CPA in section 97(1), dealing with “Relations with other regulatory authorities”. The section provides as follows -

“97 Relations with other regulatory authorities

The Commission may-

Liaise with any provincial consumer protection authority or other regulatory authority on matters of common interest and, without

limiting the generality of its power, may monitor, require necessary information from, exchange information with, and receive

information from, any such authority pertaining to-

Matters of common interest ; or A specific complaint or investigation ;

Negotiate agreements with any regulatory authority-

To co-ordinate and harmonise the exercise of jurisdiction over consumer matters within the relevant industry or sector; and To ensure the consistent application of the principles of this Act;

Participate in the proceedings of any regulatory authority; and

Advise, or receive advice from, any regulatory authority.”

16. On the reading of section 97(1) four actions come forth and to that extent could provide an idea of what the consultation required in section 100(2) could be about - liaison, negotiating of agreements, participation in each other’s proceedings, and to advise or receive advice.

16.1 Section 97(1)(a) refers specifically to liaison of the Respondent with another regulatory authority on matters of common interest or a specific complaint or investigation. As the compliance notice had been issued resulting from an alleged investigation, on the face of it, this provision has direct application. The purpose of the liaison is set out in Section 97(1)(a) namely to monitor; require necessary information from; exchange information with; and receive information from such authority.

16.2 Section 97(1)(b) is about regulators negotiating agreements to coordinate and harmonise jurisdiction and ensuring consistent application of the principles of the CPA.

16.3 Section 97(1)(c) lays the basis for the Respondent to participate in the proceedings of such regulatory authority, conceivably amongst others in instances where the regulated authority proceeds with action against a regulated entity brought to the regulatory authority’s attention by the Respondent or consumers directly.

16.4 Section 97(1)(d) allows for the giving and receiving of advice among the regulatory authorities.

17. Insofar as the content and procedures for consultation is concerned, prevailing case law suggest that -

17.1 There should be, as a starting point, some form of communication with the regulated entity.⁶ As the parties agreed to the admission of the Minute of the meeting of 22 August 2011 into evidence, we accept that there had been

communication between Respondent and the regulatory authority, ICASA and that the meeting was a deliberate getting together of more than one person or party.⁷

17.2 A consultation would usually be understood as a meeting or conference at which discussions takes place, ideas are exchanged and advice⁸ or guidance is sought and tendered.⁹ Our reading of the Minute does not reflect that the interaction between the regulators in respect of Applicant was of the above

nature. Our reading of the Minute bears out Applicant’s contention that there could not have been any question of such giving

and receiving of advice as the Respondent did not provide ICASA with an analysis report on Applicant and Respondent.

17.3 Consultation does not suggest a particular form, procedure or duration for discussions or debate.^{10 11} As the CPA does not prescribe the form that consultations should take, the procedure to be adopted is largely left in the discretion

of the Respondent being the consulting party. Consultation need not always take place face to face, but may be conducted by way of correspondence.¹² In these times of advanced communication technology, persons or parties can consult with one another in a variety of ways, such as fax or e-mail.¹³ As long as the lines of communication are open and parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of consultation will usually not be of great import.¹⁴

17.4 There appears to be no prescribed timeframe for the consultation process from the cases. Consultation can often be a somewhat continuous process and the happenings at one meeting can form the background of a later one.¹⁵ However, process must allow the parties entitled to consult a reasonable opportunity for achieving the objects for which the requirement of consultation was inserted in the enactment.¹⁶ They must be given a reasonable ample and sufficient opportunity to express their view.¹⁷ Sufficient time must be given to the consulted party to enable him or her to give the advice and sufficient time must be available to the consulting party to consider the advice tendered.¹⁸ This would obviously differ from case to case.

17.5 There should be a reasonable opportunity for the consulted party to state its views in that the consulted party must know what is proposed and be given a reasonable, ample and sufficient opportunity to express their views or to point to problems or difficulties.¹⁹ From the Minute it appears that no proposal was put forward by the Respondent. As a result the parties to the ‘consultation’

could not apply their minds to weigh and consider the matter.

17.6 The requirement of good faith is one of the cornerstones of meaningful consultations.²⁰ The consulting party must extend a genuine invitation to consult and must keep an open and receptive mind to the extent that he is able to appreciate and understand the views expressed by the consulted party. If sound argument is raised he would be receptive to suggestions to amend or vary the intended course.²¹ In casu there was no invitation to ICASA to provide input and or guidance in respect of the Applicant.

17.7 The consulting empowered authority is not obliged to give effect to the wishes of those whom he has to consult. He is the sole decision-maker regarding the actions eventually to be taken.²²

18. Timing of consultation –

18.1 The CPA requires that the consultation should take place before issuance of the compliance notice. From the cases as regards the time when the consultations should be embarked upon, the Court held that it suffices to say that the enactment specifically requires it to be done prior to exercising the powers therein granted to him.²³ The right to consult is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of the proposals before the mind of the executive become unduly fixed.²⁴

18.2 The meeting took place before the compliance notice was issued. Meeting held on 22 August 2011 and compliance notice issued on 13 October 2011 after the meeting took place.

19. Critical in this matter is that, in our view, the Respondent's consultation with ICASA falls far short of the consultation required in section 100(2) of the CPA, in that Respondent did not –

19.1 Consult on the Applicant at the meeting of 22 August 2011;

19.2 Provide ICASA with information about Applicant's alleged contraventions of the CPA; and

19.3 Provide ICASA with the outcome of the investigation that the Respondent purportedly launched into Applicant's compliance with the CPA and its proposed actions to allow the parties to the consultation to achieve the objects for which the requirement of consultation was inserted in the CPA; and to apply their minds to weigh and consider the matter to advise or receive advice.

Ruling

20. We accordingly find that the Respondent did not discharge itself of the peremptory obligations placed on it in terms of section 100(2) of the CPA.

21. As this ground is in itself sufficient ground to render the issuance of the compliance notice irregular and of no force and effect, the Tribunal makes no finding in respect of the second point in limine raised by the Applicant.

22. We accordingly make the following order:

22.1 The compliance notice issued by the Respondent is cancelled.

22. 2 No order is made for costs.

Handed down on the 28th day of March 2012.

[signed]

Ms D R Terblanche

Panel Member

Prof. Joseph M. Maseko, Presiding Member and Adv. Neo Sephoti, Panel Member, concurring

1 1999

(4) SA 1229 (C) at 1240

2 1987 (1) SA 483 (CK) at 490C

3 [1965] AC 1111 (PC) page 1124D-F cited on page 1242 of the Hayes judgment

4 1970 2 All ER 264 (CA) at 269

5 [1986] 1 WLR 1 (QB) at 4F- H

6 At 2 Supra at 490C

7 At 2 Supra; Applied in Hayes and Another v Minister of Housing 1999(4) SA 1229 (c)

8 See section 97(1)(d)

9 At 1 Supra; Applied in Robertson and Another v City of Cape Town 2004 (5) SA 412(C)

10 At 2 Supra; Applied in Hayes and Another v Minister of Housing 1999(4) SA 1229 (c)

11 Fletcher v Minister of Town and Country Planning [1947] 2 All ER 496

12 At 1 Supra

13 At 1 Supra

14 At 1 Supra; Applied in Robertson and Another v City of Cape Town 2004 (5) SA 412(C)

15 At 2 Supra;

Applied in S v Smit 2008 (1) SA 135 (T)

16 At 2 Supra; Applied in Hayes and Another v Minister of Housing 1999(4) SA 1229 (c)

17 Port Louis Corporation v Attorney General of Mauritius 1965 AC 1111 (PC)

18 R v Secretary of State for Social Services [1986] 1 WLR 1 (QB)

19 At 2 Supra

20 At 2 Supra

21 At 2 Supra; applied in Robertson and Another v City of Cape Town 2004 (5) SA 412 (C) and S v Smit 2008 (1) SA 135 (T)

22 At 2 Supra

23 At 2 Supra; Applied in Hayes and Another v Minister of Housing 1999(4) SA 1229 (c)

24 Sinfield and Others v London Transport Executive [1970] 2 All ER 264 (C)

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