

SOUTH AFRICA / JUDGMENT

Telkom SA SOC Ltd v Vodacom (Pty) Ltd and Others (FTN143Oct20 / CNF074Sep21) [2022] ZACT 48; [2022] 1 CPLR 19 (CT) (7 February 2022) [2022] ZACT 48

COURT

Competition Tribunal

BEFORE

Y Carrim, A Wessels

CASE / FILE NUMBER

FTN143Oct20 / CNF074Sep21

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: FTN143Oct20 / CNF074Sep21

In the access application between:

Telkom SA SOC Ltd Applicant

And

Vodacom (Pty) Ltd First

Respondent

Wireless Business Solutions (Pty) Ltd t/a Rain Second Respondent

Competition Commission of South Africa Third

Respondent

Independent Communications

Authority of South Africa Fourth

Respondent

In re: the failure to notify a merger application between:

Case No.: FTN143Oct20

Authority of South Africa Fourth

Respondent

Panel: Y Carrim (Presiding Member) A Wessels (Tribunal Member)

Heard on:

18 January 2022

Last Submission Date: 24 January 2022

Order Issued on: 07 February 2022

ORDER

Following the hearing of this access application from Telkom SA SOC Ltd (“Telkom”) to compel the Competition Commission (the “Commission”) to provide its full record of investigation, alternatively specific documents (item numbers in the Commission's Index) listed in its application, filed under cover of notice of motion on 7 September 2021,[1] the Tribunal makes the following order:

1. The application for access to the Commission's full confidential record of investigation is dismissed.
2. The application in relation to the following items is dismissed on the basis that these documents are only referenced in the descriptive portion of the Commission's supplementary explanatory affidavit filed on 30 July 2021 (the “Commission's report”) which portion simply details the Commission's investigative steps and where these items are not expressly referenced in the analysis sections of the Commission's report (i.e. Parts C, D, F and G) –

2.1. Vodacom's May submissions;[2]

2.2. Vodacom's 11 and 30 June letters;[3] and

2.3. Vodacom's 8 July submissions.[4]

3. In relation to the ICASA documents –

3.1. The application for access to the ICASA report[5] is granted, on the basis that reference to this report is made in the analysis sections of the Commission's report and the ICASA report findings are by a public regulatory body.

3.2. The application for the ICASA communications[6] is denied on the basis that these documents are only referenced in the descriptive portion of the Commission's report; are not expressly referenced in the analysis sections of the Commission's report; and the conclusions that ICASA's drawn from such communications form part of its report (which Telkom is being granted access to).

4. The application for the item titled “Rain information provided to the Commission”,[7] includes a request for documents of which only two documents are expressly referenced in the analysis sections of the Commission's

report namely documents 83 and 249 of the Index:

- 4.1. The application for access to document 83 is granted, on the basis that it is expressly referenced in the analysis sections of the Commission's report.
- 4.2. In relation to document 249 the application is denied even though the document is referenced in the analysis section of the Commission's report (paragraph 148); this is because the paragraph used to support Telkom's request describes Rain's submissions to the Commission regarding Vodacom's offer to Telkom which amounts to information that is within Telkom's knowledge. Furthermore, the content of this paragraph does not relate to issues of control in relation to the alleged merger that was not notified.
- 4.3. The application is dismissed for all the other documents requested under the "Rain information provided to the Commission" item on the basis that these documents are only referenced in the descriptive portion of the Commission's report and are not expressly referenced in the analysis sections of the Commission's report.
5. Rain's third-party configuration manager arrangements are referred to in the analysis sections of the Commission's report (per paragraphs 95 and 105) though not expressly referenced. The terms of the configuration manager agreement are relevant to the question of which entity controls the configuration of Rain's 4G network. For this reason the application for access to Rain's third-party configuration manager arrangement documents[8] is granted subject to the following provision: The Commission must obtain Nokia's consent to share the agreement between it and Rain (documents 263 and 264) with Telkom in terms of the prevailing confidentiality regime; if Nokia objects to this, the parties may approach the Tribunal for resolution of the dispute.
6. The application for access to Rain's July slide presentation[9] is dismissed on the basis that this document is only referenced in the descriptive portion of the Commission's report and Telkom has not sufficiently demonstrated that portions of Mr Brierley's report rely on this document.
7. The application for access to Rain's April slide presentation[10] is granted because this document is expressly referenced in the analysis sections of the Commission's report.
8. All access granted in terms of this order is made with reference to the principles of fairness and that Telkom, Vodacom and Rain are direct competitors, and that the requested information may be of a highly competitively sensitive nature.
9. Access to the documents granted in terms of this order is limited to Telkom's legal representatives subject to the provision of the appropriate confidentiality undertakings. Of the documents that Telkom has been granted access to, Telkom, Rain and Vodacom must liaise regarding the list of documents that they agree may be provided to Telkom's economic or technical advisors; where the parties cannot reach consensus regarding this list, they may approach the Tribunal for direction.

10. Each party to bear its own costs.

Signed by: Yasmin Tayob Carrim

Signed at: 2022-02-07 16:01:50 +02:00

Reason: I approve this document

Date: 07 February 2022

Presiding Member Ms Yasmin Carrim

Concurring: Mr Andreas Wessels

[1] It was alleged that there were discrepancies between what Telkom requested in its revised Annexure B and its Founding Affidavit

(“FA”). During the hearing, Telkom’s heads of argument (“Telkom heads”) was taken to be the authoritative document. For purposes of this order, the sum of Telkom’s request is taken to be Telkom’s post hearing submission of 22 January 2022 (“Telkom’s post hearing submission”) and its FA read with the Telkom heads.

[2] Commission Record of Investigation Index (“Index”) documents 62, 92-4 and 98-9 as requested at item 1 of Telkom’s

post hearing submission with reference to requests made in Telkom’s FA at p. 70-1, para 89-92 and Telkom heads at section C2.8, paras 110-2.

[3] Index documents 123-4 and 168-87, 190-4, 209-12 as requested at item 2 of Telkom’s post hearing submission with reference to requests made in the FA at p. 71-3, para 93-101 and Telkom heads at section C2.9, paras 113-7.

[4] Index documents 226-7 and 235-7 as requested at item 3 of Telkom’s post hearing submission with reference to requests made in the FA at

p. 73, para 102 and Telkom heads at section C2.10, paras 118- 20.

[5] Index documents 245-7 as requested at item 4 of Telkom’s post hearing submission with reference to requests made in the FA at p. 67-9, paras 74-80 and Telkom heads at section C2.6, paras 104-8.

[6] Index documents 54-5, 87, 101-2, 127-9 as requested at item 5 of Telkom’s post hearing submission with reference to requests

made in the FA at p. 69-70, paras 81-4 and Telkom heads at section C2.6, paras 104-8.

[7] Index documents 47, 63-6, 69, 82-6, 106-7, 117-9, 125-6; 153-62; 241, 248-50 as requested at item 6 of Telkom’s post hearing

submission with reference to requests made in the FA at p 60-4, paras 57-62 and Telkom heads at section C2.3, paras 94-8.

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- [8] Index documents 261-4 as requested at item 7 of Telkom's post hearing submission with reference to requests made in the FA at p. 65, paras 63-6 and Telkom heads at section C2.4, paras 99-101.
- [9] Index document 267 as requested at item 8 of Telkom's post hearing submission with reference to requests made in the FA p. 58-60, paras 49-56 and Telkom heads at section C2.2, paras 86-93.
- [10] Index document 53 as requested at item 9 of Telkom's post hearing submission with reference to requests made in the FA p. 55-8, paras 44-8 and Telkom heads at section C2.1, paras 75-85.
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