

SOUTH AFRICA / JUDGMENT

Vodacom Service Provider Company (Pty) Ltd and Another v National Consumer Commission (NCT/2793/2011/101 (1)(P))

[2012] ZANCT 9 (8 June 2012)

[2012] ZANCT 9

COURT

National Consumer Tribunal

BEFORE

T Woker, F K Manamela, N Sephoti

CASE / FILE NUMBER

NCT/2793/2011/101 (1)(P)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

IN CENTURION

CASE

NUMBERS: NCT/2793/2011/101 (1)(P)

DATE:08/06/2012

In

the matter between:

VODACOM
SERVICE PROVIDER COMPANY (PTY)
LTD.....1ST
APPLICANT
VODACOM
(PTY)
LTD.....2ND
APPLICANT
and
NATIONAL
CONSUMER COMMISSION
.....RESPONDENT

CORAM: WOKER
T. (PROF.) (PRESIDING MEMBER);
MANAMELA
F.K. (ADV.) (PANEL MEMBER)
SEPHOTI
N. (ADV) (PANEL MEMBER)

JUDGEMENT

INTRODUCTION

The First Applicant is VODACOM SERVICE PROVIDER COMPANY (PTY) LTD (VSP), a private company with limited liability incorporated in South Africa.

The Second Applicant is VODACOM (PTY) LTD (Vodacom), also a private company with limited liability incorporated in South Africa. The Second Applicant is licensed as an electronic communications network operator in South Africa.

Both the First Applicant and the Second Applicant are part of Vodacom Group (Pty) Ltd whose registered physical address is 82 Vodacom Boulevard, Vodacom Valley, Midrand, 1685.

The Second Applicant was joined as a party to these proceedings by the presiding member acting in terms of Rule 16 of the Tribunal Rules. The reasons for this are explained below. Neither the First Applicant nor the Respondent objected to this and the representative for the First Applicant, Adv van der Linde SC, confirmed that he had a mandate to act on behalf of both the First and the Second Applicant. For the sake of simplicity both the First and Second Applicants are referred to as the Applicant in this judgment.¹

The Respondent, represented by Mr. O Thupayatlase, is the NATIONAL CONSUMER COMMISSION established in terms of section 85 of the Consumer Protection Act, Act 68 of 2009 (CPA).

The Applicant brought an application to the National Consumer Tribunal (Tribunal) to have a compliance notice issued against it by the Respondent, reviewed and cancelled in terms of section 101 (1) of the CPA.

The Tribunal has jurisdiction to hear this matter in terms of section 101 (1) of the CPA. This section provides that a person issued with a compliance notice in terms of section 100 may apply to the Tribunal in the prescribed manner and form for its review.

This judgment follows the hearing of this matter on 4 May 2012 at the offices of the Tribunal in Centurion. The judgment is based largely on written submissions by all the parties as well as oral arguments and written heads of argument. From the Applicant's heads of argument it became clear that the Applicant based its review application on several grounds. These grounds can broadly be divided into two categories of issues, namely jurisdictional issues and issues on the merits of the matter.

The Tribunal *mero motu* took the decision to deal with the jurisdictional issues first as the Tribunal considered it unnecessary to consider the merits of the matter until a decision had been made on the jurisdictional issues. The Tribunal was of the view that it would serve little purpose to continue into a lengthy hearing on the contents of the compliance notice itself if the Tribunal determined that the compliance notice had not been issued in accordance with the law. This judgment therefore focuses on the jurisdictional issues and not the merits of the compliance notice itself.

THE

FACTS

The facts relating to this matter are generally common cause.²

On 18 April 2011, the Respondent informed VSP in writing that it intended to do a preliminary investigation into the ICT sector. This investigation was to focus on fixed line telephone contracts and mobile telephone contracts.³

VSP responded to this letter on 6 May 2011 and attached a copy of its pre-CPA Subscriber Agreement as well as a copy of its amended

subscriber agreement.⁴ This amended agreement was marked "internal version 4". In its letter to the Respondent, VSP stated as follows:

The new contract terms and conditions were finalized within four weeks of the promulgation of the CP Act Regulations on 1 April 2011 to ensure that it incorporates the final requirements as prescribed. The finalized documentation is going through the approval process and will shortly be sent to the creative agencies for printing and distribution. We anticipate that these processes will be completed and the new contract terms and conditions available across all Vodacom outlets by 31 July 2011.

On the same day the Respondent requested VSP to provide it with copies of the agreements utilized for 3G cards and modems.⁵ VSP explained to the Respondent that the same subscriber agreement as forwarded under cover of the letter dated 6 May 2011 applied to all post-paid services, be it for voice or data.⁶

On 8 June 2011 the Respondent provided VSP with a preliminary analysis of VSP's subscriber agreement and requested a meeting to discuss this analysis.⁷ The analysis sets out its objective as follows:

The objective of the analysis was to identify clauses in the Vodacom Consumer Contract that appear to be contrary to the provision of the Consumer Protection Act.

In order to meet the above objective comparisons within the Analysis Report were drawn between clauses appearing in the Vodacom Consumer Contract and the relevant provisions of the Act.

The parties met on 6 July 2011 to discuss the findings of the preliminary analysis of VSP's subscriber agreement. The Applicant contended that the Respondent accepted the explanations on various issues raised by the Respondent and that various amendments to internal version 4 of the subscriber agreement as agreed to at the meeting were made.⁸

The Applicant contended that the only issue on which the parties did not reach agreement related to Clause 7.1.3 of the Subscriber agreement (internal version 4) dealing with the forfeiture of unused airtime. The Applicant further contended that the Respondent specifically asked Vodacom to make further submissions to the Respondent concerning their opinion on the application of section 14 of the CPA to this particular clause.

The Respondent disputed that clause 7.1.3 (and the issue of forfeiture of air time) was the only issue on which there was a dispute. In its replying affidavit, Mr Thupayatlase, who deposed to the opposing affidavit on behalf of the Respondent, stated as follows:

The Commission raised various issues as being problematic. I have checked the minutes of meetings held with the VSP. Copies that I have considered do not reflect that clause 7.1.3 was the only issue in respect of which there was no agreement at the time.⁹

In its replying affidavit the Applicant stated that there were no minutes of these meetings. It also stated that it had asked the Respondent to produce copies of these minutes but that it had never received them.

At this point it is important to note that in response to a question from the Tribunal, at the hearing, Mr Thupayatlase confirmed that no minutes had been kept and that he had not perused the minutes as stated in the affidavit.¹⁰ He stated that this must have been a typing error.

In a letter, dated 7 July 2011,¹¹ the Applicant made available to the Respondent a revised subscriber agreement which the Applicant contends was based on what had been agreed during the meeting the previous day. In that letter the Applicant pointed out that the clauses which deal with forfeiture of unused minutes were subject to further internal discussion and consideration. These clauses included clause 7.1.3 as well as clauses 6.2, 6.3, 7.1.2, 7.1.5, 7.2.2 and 16.6.¹²

The Respondent replied by sending a letter in which the Respondent stated that it did not intend to analyze the new agreement and that all it requested was that the subscriber agreement should be CPA compliant. It requested that a date be set when a CPA agreement would be issued to consumers.¹³ The letter did not deal with the issue relating to the forfeiture of air time or the need to make further submissions on this.

On 19 July 2011 Vodacom responded to the Respondent's request for a date by which it would ensure that its agreement met the Respondent's requests and stated that it would have the agreements available for its customers from 31 October 2011.¹⁴

The Respondent contacted the Applicant and requested a meeting. This meeting took place on 27 July 2011. At this meeting the Respondent requested that the Applicant sign a consent order which it had prepared. The Applicant declined to sign this order and requested time to consider the contents of the consent order. At the meeting the Respondent also raised the issue of the forfeiture of airtime. The Applicant undertook to provide the Respondent with a letter explaining the reasons why it was of the view that the latest subscriber agreement did not contravene section 14 of the CPA. This letter, dated 29 July 2011, was subsequently sent to the Respondent.¹⁵ In this letter the Applicant reiterated its position that it did not believe that it was engaged in conduct which constituted a prohibited practice for the purposes of the CPA and it explained its position regarding section 14 of the CPA in some detail. The Applicant stated the following in this letter:

At our meeting on 6 July 2011 it became apparent that there are material differences of opinion and interpretation between us in respect of certain provisions of the Act and that it is in our mutual interests to try to resolve these differences.

On 1 August 2011 the Applicant sent a letter to the Respondent in which it explained why it was not in a position to sign the consent order in its current shape and form. Its reasons included inter alia the following:

the preliminary analysis conflated both the old (pre-CPA) and the new (version 4) agreement. This, the Applicant contended, led the Respondent to the erroneous conclusion that the subscriber agreement did not comply with the requirements of the CPA.

The consent order did not take into consideration the feedback provided to the Respondent at the meeting of 6 July 2011.

The consent order inaccurately stated that at this meeting the Applicant acknowledged and agreed that the subscriber agreement was in contravention of the CPA.

The consent order terms extended beyond the scope of the investigation and should Vodacom sign such a consent order, it would be exposed to the extensive fines and penalties for conduct unrelated to the issues under the investigation and without any formal investigation into any such alleged prohibited conduct.

The Applicant did not believe that it had engaged in any prohibited conduct under the Act.

On 3 August 2011 the Respondent sent a letter to the Applicant in which it indicated that it would "not be unreasonable to seek compliance with the CPA by 31 October 2011". It also acknowledged that Vodacom had been acting in good faith and had already made attempts to draft a CPA compliant contract. It concluded the letter by stating that the alternative to a consent order in terms of section 74 "shall be a compliance notice in terms of section 100".¹⁶ Attached to the letter

was a consent order to be signed by the Applicant. This consent order indicated that the consent order was addressed to Vodacom Service Provider (Pty) Ltd, that is (VSP).¹⁷

On 4 August 2011 the Applicant responded to the Respondent's letter of 3 August 2011 and again stated that it could not sign the consent order but offered to hold a meeting with the Respondent in order to discuss its reasons. The Applicant also requested that the Respondent furnish reasons for issuing the consent order.¹⁸ The suggested meeting did not take place and the Respondent has not furnished reasons for issuing the consent order.

On 24 August 2011, the Respondent served the compliance notice on the Applicant.

ISSUE TO BE DECIDED BY THE TRIBUNAL

The issue which the Tribunal must decide is whether the compliance notice has been issued in accordance with the law.

The Applicant asserted that there were three jurisdictional grounds on which the compliance notice should be reviewed. These are as follows -

The compliance notice was served on the wrong party;

The compliance notice related to the wrong contract, the issuing of the compliance notice was not rational and was done for the wrong reasons; and

There was no consultation prior to the issuing of the compliance notice as required by section 100 (2).

The Applicant presented its arguments on each of these three grounds and then the Respondent responded. For the ease of reading, the Applicant's submissions on each issue will be dealt with first followed by the Respondent's response.

The compliance notice was served on the wrong party

The Applicant raised the issue that the compliance notice was served on the wrong party at the pre-trial hearing held on 20 January

2012. The Applicant submitted that the compliance notice ought to have been issued to VSP and not to Vodacom. The Applicant suggested therefore that the name of the party on which the notice had been served should be amended by agreement between the parties. Mr van der Linde SC, who appeared on behalf of the First Applicant stated that he had a mandate to represent both parties. The Respondent refused to accept that the name of the party should be substituted but agreed to consider the matter further and to submit a further affidavit on the matter. The Respondent was granted an opportunity of one week to revisit this issue.¹⁹

The Respondent filed a Supplementary Affidavit on 15 February 2012. In this affidavit the Respondent reiterated its view that Vodacom was the correct party on which to serve the notice,²⁰ and it declined to make the substitution as requested by Mr van der Linde SC on behalf of VSP. At the hearing Vodacom was joined as a second applicant to these proceedings.

The Applicant's

Submissions

The Applicant based its assertion that the compliance notice ought to have been issued to VSP and not to Vodacom on its claims that:

33.1 Before a compliance notice is issued, the Respondent must first have reasonable grounds to believe that the entity to which the compliance notice is to be issued is engaged in prohibited conduct. This means that it is the entity against whom the notice is issued which must have engaged in prohibited conduct and not some other entity – unless there are circumstances where the conduct of one person may be imputed to another.

33.2 Vodacom and VSP operate separately and have distinct legal personae.²¹

33.3 The notice was issued to Vodacom and not VSP. Vodacom does not enter into consumer agreements. Vodacom does not conclude any of the transactions contemplated in section 5(1) of the CPA.

33.4 Vodacom can only be held liable for the acts of a subsidiary in circumstances where it is justified to pierce the corporate veil.

33.5 The law has always required conduct that amounts to fraud, dishonesty or impropriety before disregarding the corporate identity of a person.

33.6 The Respondent has not based its case on any circumstances where it would be justified to pierce the corporate veil.

33.7 In any event piercing the corporate veil would not assist the Respondent because when the corporate veil is pierced, the court disregards the separate juristic personality of the entity concerned, and attaches liability to those who own the entity. (The Applicant gave the following example: when the court pierces the corporate veil of ABC (Pty) Ltd, does so in order to hold liable the owners of ABC (Pty) Ltd who, were it not for the piercing of the corporate veil, would be able to rely on the separate existence and corporate identity of ABC (Pty) Ltd to escape their own personal liability. The Applicant then applied this example to the present matter, and argued that even if the corporate veil of Vodacom could be pierced, it does not result in imposing a liability upon Vodacom for the prohibited conduct of VSP. This is because VSP is not the shareholder of Vodacom; Instead it is the other way round. Vodacom is the controlling shareholder of VSP). Therefore, the Applicant argued, piercing the corporate veil of Vodacom does not assist the Respondent, even if it were to be permitted in this case.

33.8 The Tribunal is not bound by its decision in Mobile Telephones Networks (Pty) Ltd and the National Consumer Tribunal (Case No NCT/2738/2011/101 (1) (P) handed down on 19 March 2012.

The Respondent's

submissions

The Respondent countered these arguments by contending that:

34.1 VSP had been granted a sub-license by Vodacom (which was licensed by ICASA) as it had no license to provide mobile telecommunications

services in its own name and right and that it therefore remained the duty of Vodacom to ensure that VSP abides by the terms and conditions of the license as a sub-licensee.

34.2 The Tribunal has already ruled on this point in a matter that is the same as this matter namely, *Mobile Telephone Network v the National Consumer Commissioner*. The Tribunal dismissed a similar point raised by MTN that MTN (Pty) Ltd was not the correct party because the company that enters into subscriber agreements is MTN Service Provider. This judgment provides a precedent for this matter.

34.3 Vodacom's attempt to divide itself from its responsibilities is a contravention of its licensing terms and conditions as set out by ICASA.

The compliance notice relates to the wrong contract, the issuing of the compliance notice was not rational and was done for the wrong reasons

The Applicant's

submissions

The Applicant submitted that:

35.1 The parties reached an agreement in July 2011 in terms of which the Applicant was given until 31 October 2011 to review and amend its subscriber agreement to be compliant with the CPA. In the Compliance Notice the Respondent, without giving any reasons therefore required the Applicant to be compliant one month earlier, on 30 September 2011.

35.2 The Applicant had already amended the clauses which the Respondent found to be problematic and the only clause which was unresolved at the date when the compliance notice was issued was clause 7.1.3. This clause related to the forfeiture of airtime. (The Applicant accepted that this issue remained an issue of dispute and pointed out that it had sent a letter to the Respondent dated 29 July 2011 explaining why it did not believe that this amounted to a contravention of the CPA. The Respondent did not respond to this letter).

35.3 The compliance notice was based on an earlier version of the Applicant's contract and did not take into account the amendments which the Applicant had made to the subscriber agreement (this was now version 6). The compliance notice therefore related to an obsolete agreement and which the Respondent knew would not be the agreement which was to be put into the public domain.

35.4 The compliance notice was issued because the Applicant refused to sign the consent order. The compliance notice was issued for a purpose not contemplated in the Act. The Respondent must issue a compliance notice in accordance with section 100 (1) of the Act which states that a compliance notice is issued to a person whom the Commission on reasonable grounds believes is engaging in prohibited conduct – not as a tool to compel a party to sign a consent order which it does not agree with.

35.5 The Applicant's refusal to sign the consent order does not indicate an intention not to comply with the CPA. It refused to sign the consent order because it did not agree with the proposed terms. Furthermore, the Respondent did not negotiate the terms of the consent order with the Applicant but simply sought to impose them on the Applicant unilaterally. This is contrary to section 74 of the CPA which presupposes that the Respondent and the person concerned will "agree to the proposed terms of an appropriate order."

35.6 The compliance notice was issued in a pique and therefore irrationally. Such conduct on the part of the Respondent constituted reviewable administrative action under at least sub-sections 6 (2) (e) (ii), (iii) and (vi) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

35.7 The conduct of the Respondent was inconsistent with the power of an impartial administrator and its conduct was evidence of arbitrariness and capriciousness.

The Respondent countered the above submissions by stating that:

36.1 At the meeting of 27 July 2011 and thereafter, clause 7.1.3 was not the only clause in dispute and that no agreement was reached between the parties during such meeting. There were, and still are, other issues of contention between it and the Applicant, namely clauses 13, 15, 20, 16 and 23.

36.2 During the meetings held between the parties, it was understood by the Respondent that there was some degree of consensus between the parties on the issues. It requested the Applicant to sign a consent order to show its commitment (*bona fides*) to comply with the CPA. It could not rely on apparent consensus to confirm a formal process.

36.3 The Applicant refused to bind itself through a consent order and this left the Respondent with no other option but to issue a compliance notice. This was the last step in an attempt to resolve the disagreement between the parties.

36.4 Since no agreement existed between the parties, the Respondent was entitled to specify any conduct by the Applicant that was considered to be in contravention of the CPA for the purposes of section 100.

There was no consultation prior to the issuing of the compliance notice as required by section 100 (2).

The Applicant's arguments

37.1 The compliance notice was issued to Vodacom which is a regulated entity. The regulator is the Independent Communications Authority of South Africa (ICASA).

37.2 In terms of section 100 (2) the Respondent is obliged to consult with ICASA prior to the issuing of a compliance notice.

37.3 “Consult” means to take counsel together, deliberate and confer, seek information or seek advice from someone, to seek the opinion of someone, a full opportunity or view to be stated.

37.4 In *African Christian Democratic Party v Independent Electoral Commission*

[2006] ZACC 1; 2006 (3) SA 305 (CC) it was held that in determining whether there has been compliance with a statutory provision the question to be answered is whether what has been done constitutes compliance with the statutory provisions viewed in the light of their purpose.

37.5 The purpose of the compliance notice contemplated in section 100 is to enforce compliance with the provisions of the CPA. Accordingly, the purpose of the consultation contemplated in section 100(2) between the respondent and ICASA is to determine whether there is a possibility of an accommodation between the Respondent and ICASA on ensuring compliance with the CPA by regulated entities such as Vodacom.

37.6 A meeting was held on 22 August 2011 between ICASA and the Respondent purportedly in terms of section 100. The minutes of the meeting indicate that the Respondent went to “tell” ICASA that compliance notices were going to be issued to Vodacom and others and not to consult with ICASA on the reasons for issuing the notices and more importantly not to seek ICASA’s agreement on the steps to be taken to ensure compliance with the CPA by regulated entities. The Respondent did not create an opportunity for ICASA to persuade the Respondent not to issue the notice should ICASA form that view.

37.7 The minutes do not indicate that the Respondent provided ICASA with the correspondence between the Applicant and the Respondent. It does not appear from the minutes that the Respondent informed ICASA that the Applicant undertook to fully comply with the CPA with effect from 31 October 2011. Without this information having been placed before ICASA, no meaningful and bona fide consultation could have taken place.

The Respondent countered the Applicant’s submissions by arguing that:

38.1 There is a distinction in the argument that says that the Respondent did not consult sufficiently for such consultation to meet the basic requirements of a proper consultation on the one hand, and to say that the Respondent did not consult at all.

38.2 The Applicant argued that there was no consultation because it (the Applicant) was not invited to the meeting. This was an attempt to rewrite the provisions of section 100 (2) by suggesting that section 100 (2) requires that there has to be consultation not only with the regulatory authority but also with the regulated entity such as Vodacom. A proper interpretation of the section indicates that consultation must take place between the regulator and the Respondent and such consultation does not require the presence of the regulated entity.

38.3 Consultation did take place on 22 August 2011 and therefore the only issue to be determined is whether such consultation was consultative enough. The only body which can state whether consultation was sufficient is ICASA and ICASA has not been afforded an opportunity to say whether in its view, it was satisfied with the consultation that took place between itself and the Respondent. The Applicant has no authority to speak on behalf of the Regulatory Authority and all submissions which the applicant is making are submissions that only ICASA can make.

38.4 It is insulting to ICASA for the Applicant to argue that ICASA was told of the meeting and that this meeting did not constitute consultation.

38.5 The case of African Christian Democratic Party v Independent Electoral Commission is irrelevant to this discussion because it did not deal with the same issues – it dealt with consultation between two parties to litigation and not about a regulated body that wanted to be part of a meeting it was not meant to be part of in terms of the legislation.

THE LAW

As pointed out by Ngcobo CJ in *Albutt v Centre for the Study of Violence and Reconciliation*²² it is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. The rule of law requires that all of those who exercise public powers do so within the powers which have been conferred upon them and that all their decisions and acts are authorized by law.²³

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,²⁴ Chaskalson P stated that it is “a fundamental principle of the rule of law, recognized widely that the exercise of public power is only legitimate where lawful”²⁵ and that “it is central to the conception of our constitutional order” that public bodies are “constrained

by the principle that they may exercise no power and perform no function beyond that conferred on them by law”.²⁶

In *S v Mabena*²⁷ Nugent J stated as follows:

The Constitution proclaims the existence of a State that is founded on the rule of law. Under such a regime legitimate State authority

exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with the law is a nullity.

The rule of law embraces a number of different themes but the most fundamental theme is that administrators must exercise their authority according to the law and cannot exercise it arbitrarily. In other words, they cannot be, as Goldstone J stated in *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange*²⁸ a law unto themselves.²⁹

Compliance notices are governed by section 100 of the CPA. This section sets out certain jurisdictional facts which must be satisfied before a compliance notice is issued. These are the following:

The compliance notice is issued to a person or association of persons whom the Commission on reasonable grounds believes has engaged in prohibited conduct; and

Before the compliance notice is issued,³⁰ the Commission must consult with the regulatory authority that issued a license to that regulated entity.

A jurisdictional fact is a pre-condition which must exist prior to the exercise of administrative power (known as a substantive jurisdictional fact) or a procedure that must be followed when exercising the power (known as a procedural jurisdictional fact).³¹ According to Hoextra, “the point about jurisdictional facts is that the exercise of power depends on their existence or

observance, as the case may be. If the jurisdictional facts are not present or observed then the exercise of the power will as a general rule be unlawful.”

The decision of the Respondent to issue a compliance notice qualifies as administrative action.³² That being so the issuing of a compliance notice is governed by the Promotion of Administrative Justice (PAJA) Act 3 of 2000. Therefore the issuing of a compliance notice must be lawful, reasonable and procedurally fair.

In addition to section 101 of the CPA which provides for the review of a compliance notice by the Tribunal, section 6 of PAJA provides that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. A court or tribunal has the power to judicially review administrative action on a number of grounds set out in section 6 (2) of PAJA.

ANALYSIS

OF FACTS AND ARGUMENTS

Taking the above legal principles into consideration, there are a number of issues which warrant consideration by the Tribunal. These include:

47.1 Did the Respondent have a reasonable belief that the Applicant was engaged in prohibited conduct?

47.2 Was the compliance notice issued to the entity which the Respondent reasonably believed was engaged in prohibited conduct?

47.3 Was the issuance of the notice driven by reasons not sanctioned by the CPA as a basis for issuing compliance notices?”

47.4 Did the Respondent consult with the Regulatory Authority before issuing the compliance notice?

47.5 Was the issuing of the compliance notice lawful, reasonable and procedurally fair?

Reasonable belief

The Respondent must have a reasonable belief that the Applicant was engaged in prohibited conduct before it issues a compliance notice. This is a substantive jurisdictional fact which is a prerequisite before the Respondent can act.

The first and most important point to note is that the belief must be reasonable. When deciding whether or not the belief is reasonable it is important to consider whether it is sufficient that the Respondent itself believed (i.e. is a subjective belief sufficient) or must the belief be based on objective facts. This issue was dealt with by the Appellate Division in *Minister of Law and Order v Hurley*.³³ Where the legislature indicates by using words such as “must be satisfied or “in the opinion of” then subjective

belief is sufficient and it would be up to the Applicant to show that the Respondent had failed to apply its mind to the matter or that that decision was in bad faith. However, where the legislature indicates that the belief must be reasonable, the belief must be based on objective facts and the Respondent must show that there are objective grounds or facts that gave rise to or formed the basis of the belief. The court (or in this case the Tribunal) is entitled to enquire into the grounds which could reasonably found a belief as required by section 100.

In order to reach a reasonable belief it is necessary to have an investigation into the matter. In *City of Johannesburg v the National Consumer Commission*³⁴ the Tribunal concluded that a compliance notice is issued once the Commission has completed an investigation. The Tribunal reached this conclusion by evaluating those sections of the CPA which deal with investigations by the Commission and compliance notices. This issue was extensively canvassed by the Tribunal in the *Johannesburg City Council - matter* and so we do not intend to deal with all the issues again. In that judgment that Tribunal explained that a completed investigation was necessary in order to:

establish the facts of the complaint;

measure those facts against the CPA in order to reach the belief on reasonable grounds that the person against whom the compliance notice is to be issued was engaged in prohibited conduct;³⁵

ensure that the compliance notice complies with the prescribed requirements as set out in section 100 (3). The notice must provide details of the nature and extent of the non-compliance.

The question to be considered by the Tribunal is whether the Commission, in this matter, conducted an investigation in order to arrive at objective facts on which to found a reasonable belief.

The compliance notice states that the Respondent initiated an investigation in terms of section 72 of the CPA into the ICT sector. In its initial letter to the Applicant dated 18 April 2011, the Respondent stated that it intended to conduct an investigation into the ICT sector with particular emphasis on fixed line contracts and mobile cellular telephone contracts. The letter goes on to say that it was currently in the process of collecting and analyzing contracts and that this analysis will serve to inform the NCC on whether or not to pursue an investigation into the sector. After receiving a subscriber contract from the Applicant the Respondent conducted an analysis of this contract and submitted what it termed to be a preliminary (our emphasis) analysis of that contract to the Applicant. This analysis report comprises of two columns. In the first column certain sections of the CPA are set out and in the second column certain Vodacom Consumer Contract Clauses are set out. The Vodacom clauses are clauses which the Respondent is of the view relate to or contravene clauses in the CPA. The report concludes with the following statement:

It is evident from the above analysis that the relevant clauses of Vodacom Consumer Contract are in contravention of the Consumer Protection Act 69 of 2008.

The document does not however contain an analysis of these clauses. The document merely sets out those clauses which are deemed to be in contravention of the CPA. To analyze is defined as “to examine carefully and in detail”.³⁶ The clauses for discussion were identified but they were not analyzed in this document. The Respondent did not provide any

reasons in the document as to why it was of the view that the clauses were in contravention of the CPA.

A series of meetings were then held to discuss these clauses. The Applicant in a letter dated 18 June 2011, addressed to Mr Pieter Uys, was invited to a meeting with the Respondent to discuss Vodacom’s Consumer Contract subsequent to the Respondent having “conducted an analysis of the said contract as part of its ongoing investigation into the ICT industry”. The Applicant alleged that after these meetings, the parties reached agreement on all the clauses except for those clauses that related to the issue of unused air time. The Respondent disputed this. However, it became obvious during the hearing that the Respondent’s opposing affidavit incorrectly stated that Mr Thupayatlase, who deposed to the founding affidavit, “perused the minutes of the meeting and established that there were other issues on which the parties could not agree”. As this statement is incorrect, the Tribunal is left with the Applicant’s statement that the parties reached agreement on all the issues raised by the Commission except for the issue relating to unused air time.³⁷

The Applicant subsequently provided the Respondent with a new contract (referred to as version 6) which the Respondent stated that it was not going to analyze and that all it required was for the Applicant to make sure that its contract was CPA compliant. The Applicant undertook to do this by 31 October 2011. This was agreed to by the Respondent.

The Respondent then compiled a consent order which it wanted the Applicant to sign. The Applicant declined to sign a consent order and gave its reasons in a letter dated 4 August 2011. The Respondent then issued the compliance notice. From the above, it is clear that the Respondent was investigating the ICT sector, it had identified certain clauses in the Applicant's contract which it deemed to be problematic and the Applicant agreed to alter some of these clauses. However it never agreed that it was engaged in prohibited conduct and there is no final report which indicates that the Respondent analyzed the Applicant's responses and concluded finally that the clauses did amount to prohibited clauses in terms of the CPA.

Further, a perusal of the compliance notice, as well as other documents, indicates that the discussion which took place between the parties, and the amended contract were not taken into consideration when the compliance notice was issued. This notice related to the contract which was initially provided by the Applicant as well as another contract which may even be a pre-CPA contract. This is said because it appears from a perusal of the compliance notice that this compliance notice appears to relate to a version of the contract which was used by the Applicant prior to version 4. This may therefore be a pre-CPA contract.

What is important from the above discussion of the facts, is that the compliance notice was based on the preliminary document in which certain contractual terms were identified as possibly (our emphasis) being in contravention of the Act. The compliance notice was therefore based on a document which was drafted at a very early stage of an investigation into the ICT sector. In addition, although certain clauses were deemed by the Respondent to be in contravention of certain sections of the CPA, no reasons for this interpretation were given and the Applicant's explanation regarding these clauses was not taken into consideration prior to the issuing of the compliance notice. It is not suggested that the Respondent must agree with the Applicant's interpretation but it is necessary that the Applicant's arguments be taken into consideration in order to reach a "reasonable belief" and not a belief that is based on the subjective views of the Respondent.

This investigation or analysis is particularly important in the case of unfair contract terms where the contravention relates to terms which are found in the regulations rather than in the CPA itself. Section 51 of the Act sets out certain terms which are prohibited. This is commonly referred to as a "black" list of terms. If a supplier uses such terms, it will be engaged in prohibited conduct. There is no suggestion in the compliance notice that the Applicant has contravened section 51.

In addition, the legislature has included a so-called “grey” list of terms in the regulations.³⁸ Terms which fall within this list are presumed to be unfair, but a term may be fair depending on the circumstances of the case.³⁹ This means that the onus is on the supplier to demonstrate that in the particular circumstances of its case a particular term may be fair.⁴⁰ The Respondent would then have to make an evaluation before reaching a decision that a particular term was unfair and that the

supplier was engaged in prohibited conduct. In circumstances where the Respondent decided that a particular term was unfair, this must be based on a balanced and well reasoned decision and cannot be based on the subjective views of the person making that decision.

The words, unfair, unreasonable or unjust are not comprehensively defined in the CPA and therefore these words need to be interpreted. This can only be done by taking into consideration decided cases as well as the legislation and, again it must be stressed, cannot be based on the subjective perceptions of particular individuals. The legislature has given an indication of the factors to be taken into consideration when making such an assessment. Section 48 provides that a term in an agreement is unfair if among other things, the term is excessively (our emphasis) one sided or so (our emphasis) adverse to the consumer as to be inequitable. Section 52 sets out certain factors which must be taken into consideration when making an assessment regarding a particular term. These factors include the nature of the parties to the transaction or agreement, their relationship to each other, their relative capacity, education, experience, sophistication and bargaining position, those circumstances of the transaction or agreement that existed or were reasonably foreseeable at the time that the conduct or transaction occurred or agreement was made, the conduct between the parties, whether there was any negotiation between the parties, and whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement which is alleged to be unfair, having regard to any custom of trade.⁴¹

These factors raise important questions relating to issues such as whether it is only a court of law which has jurisdiction over such matters and whether it is even possible to prohibit a clause for general use as opposed to specific use relating to a specific consumer.⁴² These issues were not canvassed in this particular matter and so the Tribunal does not intend to deal with them here, however, what this discussion illustrates is that deciding the issue of when a particular term which is not prohibited in the legislation is regarded as unfair requires a detailed analysis of the circumstances in which the clause is being used.

It is clear from the documents and evidence before the Tribunal that such a detailed analysis was not conducted by the Respondent. The Respondent has failed to satisfy the Tribunal that it had a reasonable belief, based on objective facts, reasons or principles that the Applicant was engaged in prohibited conduct. In the circumstances the Respondent’s conduct may be regarded as arbitrary. Arbitrary is defined as being based on one’s own wishes, notions or will; not going according to any rule or law.⁴³

The entity on which the compliance notice was served.

The compliance notice was served on Vodacom and not VSP. There is a dispute as to whether or not Vodacom was the correct party on which to serve the notice. The Applicant argued that the notice should have been served on VSP because the matter concerns the subscriber contract which VSP enters into with its consumers. Vodacom could not have been involved in prohibited conduct in relation to this contract as it has nothing to do with the contract and does not conclude contracts with consumers. The Respondent countered this argument by stating that Vodacom can be held liable for prohibited conduct because it licenses VSP to provide services to consumers.

The Respondent referred extensively to the license conditions which allow Vodacom to permit third parties to exercise the rights and perform the obligations of the licensee under the license which it has received from ICASA.⁴⁴ In terms of those license conditions, Vodacom can be held liable in the event that the third party, in this case VSP, contravenes the conditions of the license. An analysis of the license conditions indicates that these conditions relate to contraventions of the license and not to other circumstances where Vodacom can be held liable for contraventions by the third party. This stands to reason because the license conditions relate to the conditions under which ICASA allows Vodacom to sub-license a third party. ICASA only has an interest in matters pertaining to the license and not to other matters governed by other regulatory bodies. The Tribunal finds therefore that the license conditions have no bearing on this matter.

It is not disputed that Vodacom and VSP are separate legal entities. However from the documents before the Tribunal it is quite easy to see how the lines between the two entities can become blurred. The initial communications were between VSP and the Respondent but later communications were directed at officers of Vodacom. Mr Pieter Uys to whom the letter of 18 July 2011⁴⁵ is addressed is the CEO of Vodacom Group Limited and some of the correspondence from the Applicant to the Respondent is from Nkateko Nyoka the Chief Officer: Legal, Regulatory and Government Relations of Vodacom. The documents reveal that Vodacom and VSP have been used interchangeably as if they were the same entity. This misconception on the part of the Respondent was not corrected until the compliance notice was issued. Despite this, the fact remains that these are separate legal entities and must in law be treated as such.⁴⁶

The Respondent has failed to advance any legal reasons why Vodacom should be held liable for prohibited conduct on the basis of a contract concluded between VSP (a separate legal entity) and its consumers.⁴⁷ In its heads of argument the Respondent has argued that the two companies should simply be regarded as one and the same. However,

as pointed out in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*⁴⁸ “our courts should not lightly disregard a company’s separate personality but should strive to give effect to and uphold it”. Therefore there must be cogent reasons advanced as to why this fundamental principle of law should not apply.

Apart from the argument based on the license, dealt with above, the Respondent has argued that Vodacom should be regarded as the correct party because the users of Vodacom network infrastructure are consumers who are illiterate, unsophisticated, live in remote areas, very senior citizens and minors who do not know the difference between Vodacom and VSP.

This argument cannot be sustained. The Tribunal cannot make a decision regarding the correct party to be held liable in law based on the perceptions of consumers. According to section 100 of the CPA the party who receives the compliance notice, is the party who (supposedly) engaged in prohibited conduct. In this particular instance this would be VSP as it is the entity which enters into contracts with consumers containing problematic terms, not Vodacom. The Tribunal finds therefore that the compliance notice should have been issued to VSP and not to Vodacom. This view is supported by the fact that in the service contract VSP is defined as the person with whom the consumer has entered into the agreement for the provision of services. In addition, when the Respondent prepared the consent order, the consent order cited the party which had to enter into the agreement as VSP.⁴⁹ It was therefore VSP which declined to sign the consent agreement and the compliance notice was issued for this reason (see further discussion on this point below).

The reason for issuing the compliance notice

A compliance notice is issued when the Respondent believes that a person, in this case the Applicant, has engaged in prohibited conduct. Therefore the compliance notice must be issued in order to ensure that the entity complies with the CPA and not for some other purpose. During argument the Respondent stressed the point that the Respondent was empowered to issue a compliance notice under the CPA. This is certainly correct. Nevertheless, even though an administrator may be properly empowered to take a particular decision, an affected person may challenge the lawfulness of that decision when the decision was exercised for an ulterior purpose.⁵⁰ It is not necessary for the person challenging the decision to show that that purpose had hidden, subjective or sinister aims. All that is required is that the affected person show that the administrator has been given a power for a particular purpose, and that the power has been used to achieve some other purpose. Hoextra explains as follows:⁵¹

If a court finds that powers have been used for unauthorized purposes, or purpose not contemplated when the powers were conferred, it will hold that the decision or action is illegal. This will be the result even when the powers are mistakenly used for praiseworthy purposes.

This situation is now governed by PAJA. Section 6(2) (e) (ii) provides that action may be reviewed if it was taken for an ulterior purpose or motive. There is also an overlap here with section 6(2) (e) (i) which refers to “a reason not authorized by the empowering provision”. Hoextra argues that section 6 (2) (e) (vi) which refers to actions taken “arbitrarily or capriciously” could also apply.⁵²

The documents before the Tribunal indicate that the Respondent issued the compliance notice because the Applicant refused to sign the consent order and not because the Applicant was engaged in prohibited conduct. In its letter, dated 3 August 2011⁵³ the Respondent made the following statements:

The NCC accepts that Vodacom has been acting in good faith thus far and has already made attempts to draft CPA compliant agreement....

Finally, the alternative to a Consent Order in terms of section 74 shall be a Compliance Notice in terms of section 100.

The Compliance notice contains the following statements under the heading “Steps taken by the NCC”.

In order to encourage compliance the NCC initiated a series of meetings with Vodacom and NCC indicated that Vodacom would have to sign a consent agreement in terms of section 74 of the Act in order to be bound by its commitment to amend the subscriber agreements.

On 27 July 2011 in a meeting with Vodacom a copy of a Consent Agreement was given to Vodacom for its consideration.

On 1 August 2011 Vodacom responded by saying that, Vodacom is not in a position to sign a Consent Agreement because it believes that it have not engaged in any prohibited conduct

The clearest indication of the reason why the compliance notice was issued is to be found in the minutes of the meeting with ICASA held on 22 August 2011 which reads as follows:

The Commissioner further mentioned that written commitment from these entities⁵⁴ were received to amend their contracts with different time lines. In order to ensure that the commitment is firm and binding the

Commission had to ensure that the entities sign consent orders. The entities indicated their lack of willingness to sign consent orders, with exception of Neotel. It is based on this lack of willingness from the entities that the NCC is consulting with the Authority in terms of section 100 before issuing compliance notices.

These documents indicate that the Respondent was satisfied with the steps which the Applicant was taking to ensure that its subscriber contracts were CPA compliant. What it was not satisfied with was the Applicant's refusal to sign a consent order.

Refusing to agree to a consent order does not constitute prohibited conduct under the CPA. The CPA is clear that the parties sign a consent order when they agree on the terms of that order. The Applicant has indicated that it could not sign the order because it had never agreed that it was engaged in prohibited conduct. It was prepared to amend its contracts in order to take into consideration the concerns of the Respondent but it had never gone as far as admitting that its conduct amounted to a contravention of the CPA and it was not prepared to admit this in the consent order.

We are of the view that is unlawful for the Respondent to use the threat of a compliance notice in order to force a party to agree to terms which it would not usually agree to.

Consultation with the regulatory authority.

It is a procedural requirement that before the compliance notice is issued the Respondent must consult with the regulatory authority which in this case is ICASA.

This issue was not raised by the Applicant initially in its founding affidavit. At the pre-hearing the Applicant stated that, in its view, Vodacom was the incorrect party to be named in the compliance notice. As stated above, it requested that Vodacom be substituted with VSP. However, the Respondent did not agree to this substitution. The issue of consultation then became a procedural jurisdictional fact which had to be present before the administrative action was lawful.

The compliance notice stated that consultation had taken place on 22 August 2011, two days before the compliance notice was issued, however no further details regarding that consultation were presented.

The Tribunal deemed it necessary that the parties should address the Tribunal on this issue and raised the point mero motu. A directive was issued to the parties instructing the parties that they would be required to address the Tribunal on the nature and extent of the consultation which had taken place between the Respondent and ICASA.

At the hearing the Respondent handed the Tribunal a copy of the minutes of the meeting which took place on 22 August 2011. The Applicant accepted that a meeting had taken place but it disputed that this amounted to consultation in the true sense of the word. The Applicant argued that the Respondent had gone to the meeting in order to “tell” ICASA what action it intended to take namely: to issue compliance notices to various entities in the ICT sector and not to consult with it.

The Respondent disputed this and argued that the reason why the Applicant was arguing that there was no consultation was because it (the Applicant) had not been invited to attend the meeting. The Respondent argued that it was not a requirement of the CPA for the Applicant to be invited. The Respondent also argued that the only entity which could confirm whether there had been consultation or not was ICASA.

The Tribunal discussed the issue of consultation extensively in the recent decision it handed down in *Multichoice Africa (Pty) Ltd v the National Consumer Commission*⁵⁵. The issue of what constitutes proper consultation was thoroughly canvassed with particular reference to decided cases.

A distinction can be made between this case and the *Multichoice* - case because in the *Multichoice* - case there was only a bare reference to *Multichoice* whereas in the case of *Vodacom* the Respondent set out the clauses which it (the Respondent) regarded as problematic. Nevertheless the extent of the consultation regarding the Applicant’s position still needs to be considered.

Whether or not there has been meaningful consultation must be decided on the facts and on the basis of the law. This issue cannot be decided by referring to ICASA and whether or not ICASA believed there was meaningful consultation as has been argued by the Respondent. (It is also clear that the Respondent misinterpreted the Applicant's arguments as the Applicant did not argue that there was no meaningful consultation because it was not invited to the meeting).

The meaning and requirements for a genuine consultation have been set out in a number of decided cases including decisions handed down by the Constitutional Court.⁵⁶ One requirement which is most relevant in this particular matter is that consultation must be in good faith. In *Maqoma v Sebe* NO57 Pickard J held that the requirement of good faith is one of the cornerstones of any meaningful consultation and that this

requirement clearly must exist if proper discussion or debate is to be had.

Although disputed by the Respondent, the facts establish that the Respondent presented ICASA with the initial analysis conducted on the subscriber contract which it had received from the Applicant. The Respondent did not, it seems, present any reasons explaining why it regarded such terms to be in contravention of the CPA (or at least there is no indication from the minutes that it provided such details). From the minutes it appears that the Respondent did inform ICASA that the parties were making an attempt to comply with the Respondent's requests to amend its contracts, but it did not inform ICASA that it had agreed to give the Applicant until 31 October 2011 to ensure that its contracts were compliant. The Respondent did, however, inform ICASA that it was going to issue compliance notices because the Applicant and others were refusing to sign consent agreements.

The Respondent, in argument, confirmed that it took with it the already drafted compliance notices to the meeting with ICASA. The Tribunal is of the view that if the intention of the Respondent was to consult and not just inform ICASA of its decision there would have been meaningful and critical engagement on the issues on which ICASA had concerns. The Tribunal pointed out in *Multichoice v NCC*⁵⁸ that consultation is usually understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought and tendered. In addition, the consulting party must keep an open and receptive mind. In other words, the consulting party must not approach the meeting with its mind already made up. The fact that the compliance notices were drafted before the meeting is, in the Tribunal's view, a clear indication that the purpose of the meeting was simply to inform ICASA and not to consult with it.

The issuing of the compliance notice must be lawful, reasonable and procedurally fair

As stated above, the issuing of a compliance notice constitutes administrative action and as such the Respondent must act lawfully and reasonably and in a procedurally fair manner. Much of what is said above has bearing on this and it is not necessary to repeat it again. In summary the following facts are of concern to the Tribunal:

The parties reached agreement that the Applicant would ensure that its subscriber contract was CPA compliant by 31 October 2011. This was reasonable given the fact that the CPA only came into operation on 31 March 2011 and the regulations were only published on 1 April 2011. The Respondent argued that the contract should have been compliant from this time (the compliance notice states this) but such argument is wholly unreasonable given the fact that the Respondent would only have had sight of the regulations relating to presumed unfair contract terms (or the grey list) on 1 April 2011. It is quite obvious that it would take time to assess its contracts, to come up with new ones and then to ensure that such contracts were put into the public domain. No reasonable person could expect this to be done immediately and this was initially recognised by the Respondent. However, because the Applicant declined to sign a consent order the Respondent changed its mind and in the compliance notice, the Applicant was given a deadline of 30 September 2011. This change was both arbitrary and capricious.

The Applicant made certain alterations to its existing contract and it submitted this contract to the Respondent for consideration. The Respondent declined to consider this new version and when it compiled the compliance notice it did not take these amendments into consideration. The decision to revert back to an earlier version of the contract, well knowing that the Applicant had drafted a new version, was arbitrary and capricious and it failed to take into consideration relevant considerations.

On 4 August 2011, the Applicant requested reasons from the Respondent for its decision to issue a consent order as it is entitled to receive in terms of section 5 of PAJA. The Respondent failed to provide the Applicant with such reasons before issuing the compliance notice, other than to state that the compliance notice was being issued because the Applicant failed to sign the consent order. As discussed above, this reason for issuing the compliance notice was not a lawful reason.

The Respondent drafted the consent order and sought to impose this consent order on the Applicant. A consent order is by its very nature an order which is arrived at by consent between the parties. The conduct of the Respondent was therefore arbitrary and capricious.

For all the reasons set out above the Tribunal concludes that:

The Respondent did not have a reasonable belief that the Applicant was engaged in prohibited conduct;

The compliance notice was issued to the incorrect party;

The compliance notice was issued for a reason not authorized in terms of the CPA;

The Respondent did not consult with the Regulatory Authority before issuing the compliance notice; 59 and

The issuing of the compliance notice was not lawful, reasonable or procedurally fair.

COSTS

The awarding of costs is governed by section 147 of the National Credit Act, 2005 (NCA).⁶⁰ Section 147 provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the Tribunal

after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the

circumstances do not fall within this exception the general rule that each party bears its own costs must be observed. This interpretation is unavoidable because section 147 (1) uses the word “must” and not “may” indicating that the Tribunal is not granted a discretion in this circumstances.

The Tribunal’s rules also deal with the awarding of costs. Rule 25(7) of the Tribunal Rules provides:

The Tribunal may award punitive costs against any party who is found to have made frivolous or vexatious applications to the Tribunal.

This rule allows the Tribunal to award punitive costs but only in circumstances where a party made a frivolous or vexatious application. Therefore, just as with section 147, punitive costs can only be awarded in the narrow circumstances provided for by the rules.

The Tribunal is a creature of statute and as such its powers are limited to those provided for in the statutes that govern it. At this stage the Tribunal is governed by the NCA, the CPA and its rules and these governing pieces of legislation only provide for the awarding of costs in very limited circumstances.

In short, therefore, the Tribunal cannot extend its powers to award costs outside the power which is given to it by statute. To do so would be contrary to the principle of the rule of law.

Accordingly the Tribunal makes the following order:

The compliance notice issued by the Respondent is hereby cancelled.

There is no order as to costs.

DATED THIS 8th DAY OF JUNE 2012

Prof T Woker

Presiding Member

Adv F K Manamela (Member) and Adv N Sephoti (Member) concurring.

¹ The communications between the parties were initially only between the First Applicant and the Respondent. At a later stage representatives from the Second Applicant became involved in the discussions. Although these are two separate entities, for the

purpose of this judgment it is not important whether it was the First Applicant or the Second Applicant which was involved in a particular communication and so as stated above, for ease of reading the First and Second Applicant will simply be referred to as the Applicant unless it is important to make a distinction between First and Second Applicant for a particular point.

2 Where there is a dispute regarding the facts this is specifically indicated.

3 Annexure A to the founding affidavit.

4 Annexure B to the founding affidavit.

5 Email from Rudzani Netsianda (Respondent) to Willington Ngwepe (VSP) marked Annexure C to the founding affidavit.

6 Replying email sent 11 May marked Annexure D to the founding affidavit.

7 Annexure F to the founding affidavit.

8 Founding Affidavit para 1.11.

9 Opposing Affidavit para 8.

10 See pages 93 - 95 of the Record

11 Annexure G to the founding affidavit.

12 A perusal of the contract reveals that for the most part these clauses relate to the issue of unused minutes and none of these clauses other than 7.1.3 are clauses which the Respondent found to be in contravention of the CPA (as set out in the compliance notice).

13 Annexure H to the founding affidavit.

14 Annexure I to the founding affidavit.

15 Annexure L to the founding affidavit.

16 Annexure M to the founding affidavit

17 Annexure O to the founding affidavit.

18 Annexure P to the founding affidavit.

19 See Minutes of the pre-trial hearing para 4.1.

20 The Respondent also raised a number of other issues in its supplementary affidavit (para 2-6). In a replying affidavit to the

Respondent's supplementary affidavit, the Applicant objected to this because this had not been agreed upon at the pre-trial

hearing. The Applicant contended that the Respondent had no right to file a supplementary affidavit after filing its opposing

affidavit, dealing with the issues already raised in the opposing affidavit. The objection was not pursued at the hearing and much of what is contained in the supplementary affidavit is more appropriately classified as argument itself rather than heads of argument or it relates to issues of a substantive nature. The Tribunal does not therefore make a decision as to whether or not it was proper for the Respondent to have filed a supplementary affidavit which goes beyond that which was agreed upon at the pre-trial hearing.

21 The Applicants informed the Tribunal that there was an agreement for the two to merge their businesses with effect from 1 June 2012 but that until that time these were two distinct entities.

22 2010

(3) SA 293 (CC).

23 See Baxter Administrative Law

(1984) 301.

24

[1998] ZACC 17; 1999

(1) SA 374 (CC).

25 At para 56.

26 At para 58.

27 2007

(1) SACR 482 (SCA).

28 1983

(3) SA 344 (W).

29 For the most recent discussion of the rule of law and the abovementioned cases see *Clur v Keil* 2012

(3) SA 50 (ECG).

30 Section 100 (1).

31 C Hoextra Administrative Law in South Africa 2ed

(2012) 209.

32 See definition of administrative action under section 1 of the Promotion of Administrative Justice Act 3 of 2000 and discussion of administrative action in Hoextra Administrative Law in South Africa. The Commission is established under section 85 of the CPA as “an organ of state within public administration”. It exercises public power and it performs a public function in pursuance of the objects of the CPA. The issuing of a compliance notice adversely affects the

rights of the Applicant and it has a direct, external and legal effect in that the compliance notice compels the Applicant to alter the terms of its contracts. Should the Applicant fail to comply with the compliance notice the Respondent has indicated that it intends to seek an administrative penalty of 10% of its annual turnover in the preceding financial year. The Commission itself has recognised that its conduct constitutes administrative action. In its Final Enforcement Guidelines (published under General Notice 492

in Government Gazette 34483 on 25 July 2011) it states that procedural fairness requires that the Commission take into consideration the provisions of PAJA.

33 1986

(3) SA 568 (A).

34 [2012] ZANCT 6

35 A consumer may have a valid complaint against a supplier, but before a compliance notice is issued the complaint must constitute prohibited conduct under the Act.

36 World Book Dictionary (1981)

37 Mr Thupayatlase attempted to explain this misrepresentation away by stating that this must be a typing error or misunderstanding.

However the Tribunal cannot accept this explanation. The Applicant, in its replying affidavit, responded to this paragraph in the opposing affidavit (para 3.5) and in a letter dated 13 October 2011 attached to its replying affidavit marked RAI it requested the Respondent to produce the minutes referred to in its opposing affidavit. The Respondent must have been aware of this and had ample opportunity to address any mistakes in its affidavits and has failed to do so.

38 Regulation 44 (3).

39 Regulation 44 (2).

40 For a full discussion of the distinction between 'black' and 'grey' lists in unfair contract terms legislation see T Naude "The Use of Black and Grey Lists in Unfair Contract Term Legislation: A Comparative Perspective" (2007) 124 SALJ 128.

41 See RH Christie The law of Contract in South Africa 6ed

(2011) 21.

42 For further discussion on this see T Naude "Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms under the Consumer Protection Act in Comparative Perspective" (2010) SALJ 515.

43 World Book Dictionary (1981).

44 There is also a dispute regarding which license is the correct license in this matter. The Tribunal is of the view that this does not impact on its decision in this aspect of the matter and so it does not take that issue any further.

45 Annexure F of the founding affidavit.

46 This Tribunal dealt with a similar issue in MTN v NCC (NCT/2738/2011/101 (1) (P)) [2012] ZANCT 3. However, in this particular matter which involved a single point to be decided in limine, the legal question to be decided by the Tribunal was characterized and turned on whether MTN being a distinct legal entity could (our emphasis) be cited and held responsible for the interactions between another distinct legal entity namely MTNSP and consumers.

The legal question was therefore very narrowly defined.

47 We are of the view that the Respondent should have acceded to the Applicant's request for VSP to be substituted as the correct

party on which the compliance notice should have been served, as was requested at the pre-trial hearing. This substitution would not have interfered with the Respondent's aim of ensuring that VSP's consumer contracts were CPA compliant and it would have avoided an unnecessary, long and convoluted argument based on the licensing conditions. Even if this argument was successful the Tribunal is of the view that this was an unnecessary waste of resources which would have had little or no impact on the final outcome of this matter. This applies regardless of whether the application is granted or refused.

48

[1995] ZASCA 53; 1995

(4) SA 790 (SCA).

49 Although the consent order which was drafted by the Respondent does go on to state that Mr Pieter Uys CEO of Vodacom Group Limited is duly authorized to sign on behalf of Vodacom (Vodacom in this document applies to Vodacom Service Provider (Pty) Ltd). This is just another example of where the two entities are used interchangeably which it is accepted is a cause for confusion.

50 See Hoextra Administrative Law in South Africa 307 - 309.

51 At 309.

52 At 309.

53 Annexure N of the founding affidavit.

54 That is the major players within the ICT sector including Vodacom.

55 [2012] ZANCT 4

56 See in particular *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Bengwenyana Minerals (Pty) Ltd v Genorah Resources* 2011 (4) SA 113 (CC); *Matatiele Municipality v President of South Africa*

[2006] ZACC 12; 2007 (6) SA 477 (CC) and *S v Smit* 2008 (1) SA 135 (T).

57 1987

(1) 483 (Ck GD) 483.

58 [2012] ZANCT 4

59 This conclusion appears to be unnecessary in the light of the finding above that the compliance notice was issued to the incorrect party. It is accepted that if the correct party was VSP then it was not necessary to have consulted with the regulator as VSP is not the regulated entity. However, the Respondent throughout maintained that the correct party was Vodacom. If this was the case then it also needed to satisfy the jurisdictional fact that consultation had taken place. For this reason we continued with the enquiry into the issue of consultation despite the fact that we concluded that the compliance notice should have been issued to VSP. We are mindful of the fact that a court, hearing an appeal, may come to a contrary decision on the point regarding the correct party and therefore are of the view that the issue relating to consultation should also be dealt with.

60 The Tribunal is established under the National Credit Act and deals with matters which fall under the National Credit Act as well as the CPA.

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