IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 818/2016

Date Heard: 8 December 2016

Date Delivered: 15 December 2016

In the matter between:

NOROCRAFT (PTY) LTD
t/a CORPORATE COST CUTTERS First Applicant

and

TRUDON (PTY) LTD First Respondent

TELKOM SA SOC LIMITED Second Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant seeks to review and set aside a decision by the first respondent to raise administrative charges in respect of certain listings included in the white pages telephone directory published by the first respondent.

[2] The second respondent is the majority shareholder in the first respondent. The first respondent is the sole agent for the second respondent responsible for the compilation and publication of the white pages and yellow pages telephone directories. It does so in terms of a licence issued to second respondent under section 36 of the Telecommunications Act, 1996. In terms of its licence conditions it is required to publish certain information of customers of the second respondent in the white pages directory free of charge. The licence condition provides for the first

respondent to raise charges in respect of the publication of additional material. I shall revert to these issues below.

[3] The applicant describes itself as an independent telephone directory consultant and intermediary to consumers who place entries in numerous telephone directories published by the first respondent in various regions of South Africa. It seeks to offer advice to customers of the second respondent to reduce their exposure in the first respondent's directories, typically resulting in a reduction of advertising costs. It would appear that the applicant, and certain other intermediaries, have a substantial measure of success in this endeavour. The papers reveal that the first respondent receives a substantial number of requests from the applicant and other intermediaries for the publication of information on behalf of customers of the second respondent.

[4] On 21 April 2015 the first respondent resolved to raise an administrative fee in respect of each such entry in respect of which it contends that it is entitled to charge under its licence conditions. It addressed a letter through its attorneys to the applicant, and to other intermediaries, setting out the basis for the charge. It recorded:

> "Trudon has increasingly experienced difficulty in processing requests from intermediaries. The administrative charges that Trudon are faced with, include the following:
>
> 1. requests are not on letterheads of customers;
> 2. the necessary powers of attorney are usually not signed;
> 3. the copies received containing the instructions are in some instances illegible;

4. requests are often duplicated;
5. the cover sheet of the requests submitted does not necessarily correspond to the actual request to which it is annexed;
6. Trudon's staff have to spend a significant amount of time processing the requests;
7. requests for changes to contracts with existing billing instructions are also received and have to be processed;
8. Trudon, in any event, has to make contact with its existing customers on an annual basis. This results in duplicate (and often conflicting) instructions, particularly when a substantial period of time has elapsed between the receipt of your client's publication requests and the subsequent contract with our client's customers.

The administrative burden in resulting costs incurred by Trudon to process requests received from intermediaries, has increased substantially.

Accordingly, Trudon has decided to levy an amount of R300 (excl. VAT) per customer processed by Trudon, in order to recover its administrative costs. To be clear, this levy is to recoup Trudon's administrative costs incurred and does not include the actual advertising fee for publishing in the directories. The administrative fee will need to be paid in advance into Trudon's bank account …"

[5] It is this resolution which offends the applicant and which it seeks to review and set aside.

Issues in limine

[6] Two points *in limine* arise. Firstly, the application proceeds in terms of provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). It was launched after the lapse of 180 days as prescribed in section 7(1) of PAJA and the applicant accordingly seeks condonation for the late prosecution of the application.

[7] Secondly, the function of the first respondent is performed, as alluded to earlier, in terms of a licence issued under the Telecommunications Act which is to be read together with the Independent Communications Authority of South Africa Act, 13 of 2000. In terms of the regulations which find application a party aggrieved by an alleged contravention or failure to comply with the provisions of a licence or agreement may lodge a complaint in writing with the authority (ICASA) setting out in full the nature of the alleged contravention or non-compliance.

[8] By virtue of these provisions the first respondent contends that the applicant has failed to comply with section 7(2) of PAJA which prescribes that no court or tribunal shall review an administrative action unless any internal remedy provided for in any other law has first been exhausted.

[9] Much argument was presented to me in respect of these issues. In view of the conclusion to which I have come below I do not consider that it is necessary to make any definitive finding in respect of either of these issues.

The review

[10] On the papers there are a number of disputes which have not been pursued during argument before me. Mr **Preis SC** on behalf of the first respondent, acknowledged, notwithstanding the averments on the papers, that the first and second respondents are both organs of state and that PAJA finds application.

[11] In the applicant's founding papers reliance is placed on the provisions of section 6(2)(b) and (c) of PAJA. These grounds of review were not pursued in

argument before me. Mr **Beyleveld SC**, who appeared on behalf of the applicant, confined his argument to the grounds of review set out in section 6(2)(a)(i) and (e)(i) and (ii). I shall revert to these grounds below.

[12] The review relates solely to the white pages directory and the central dispute between the parties flows from the terms of the licence conditions. The material portion of the licence conditions provides:

"5. **DIRECTORY SERVICES**

5.1 **Minimum Directory Services**

5.1.1 The Licensee shall provide or make available, free of charge, printed directories to each Customer, the form and content of which shall be determined by the Licensee from time to time.

5.1.2 The directories referred to in condition 5.1.1 shall include, at a minimum, for each of the customers in the relevant areas, other than those customers who have specifically asked not to be included, their names, addresses and telephone numbers and a list of national and international dialling codes. The Licensee may not charge for publishing the relevant data about a Customer in a directory but may charge for advertising and for providing enhanced directory listings."

[13] The first respondent's practice and its contention in respect of the licence conditions is that it is required only to publish the name, address and telephone number of a customer free of charge. The first respondent does not levy any administrative or other fee from intermediaries or from the public for accepting and processing such information. This information is published in light type print and the first respondent refers thereto as "free light type entries". In addition to the free light type entries the first respondent publishes in light type print additional telephone

numbers, fax numbers, cellular telephone numbers, website addresses and email addresses which it contends constitute “enhanced listings” for which it argues that it is entitled to charge a fee. These it refers to as chargeable light type entries.

[14] The applicant, on the other hand, contends that “enhanced listings” as referred to in the licence conditions relate only to bold type listing such as those which appear in typographical boxes rendering them more prominent than the light type listings. For this reason the applicant contends that raising a charge in respect of the publication of light type entries of customers data which exceed the minimum free publication set out in para 5.1.2 of the licence conditions constitutes a breach of clause 5.1.2 of the licence conditions. It is accordingly argued that raising a fee in respect of such publication is not authorised by the empowering provision being the licence (compare section 6(2)(a)(i) of PAJA).

[15] It is therefore necessary to consider paragraph 5.1.2 of the licence conditions. Paragraph 5.1.2 of the licence conditions requires the first respondent to publish the stipulated data relating to customers who wish their information to be published as well as a list of national and international dialling codes. The first respondent is precluded from raising charges for publishing the “relevant” data about a customer in a directory. The relevant data, it seems to me, is the stipulated data which relates to the customers being their names, addresses and telephone numbers. Where a customer requests the publication of additional information such publication constitutes an enhancement of the information which would otherwise have been published. It is therefore an enhanced listing. This interpretation accords with the practice which the first respondent has adopted for some time and which appears to

have been accepted by all. In **Trudon (Pty) Ltd v Directory Solutions CC and Another** (case no.: 99/CAC/April 2010) the Competition Appeal Court remarked in respect of the licence conditions in issue as follows:

> ‘The licence enjoins Telkom to publish annual telephone directories in each geographic area of subscribers to its telephone lines, listing, in light print, minimum information, being the names, addresses and telephone numbers of subscribers.
>
> In terms of the licence no charge may be levied to subscribers for publishing the minimum information set out above in light print; however, subscribers may be charged for “enhanced” directory listings or advertising entries in which is included information additional to the minimum information; e.g. fax numbers, e-mail and web addresses.
>
> Enhanced listings are usually in bold type and are presented in typographical block, which makes them more prominent to readers of telephone directories. The Appellant charges its customers approximately R300.00 per annum per enhanced listing entry.’

[16] These remarks were obiter in the context of the appeal before the Competition Appeal Court, however, I consider them to be correct. In **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) at 603E-604D and 608E-F, para [18] and [23] it is pointed out that in matters of interpretation the context is important. A sensible “business like” approach that gives effect to the purpose of the legislation is to be preferred over a technical interpretation which does not. The same considerations apply in the interpretation of the licence conditions. The second respondent operates predominantly line land services to its customers. The purpose of the licence is to compel the second respondent to publish information relating to the identity of its customers and the services which it provides

to them, free of charge, to all customers. Where for example cellphone numbers, web addresses and email addresses are to be published they would have no connection with the services which the second respondent provides and, adopting a business-like approach to the interpretation of the licence conditions, I do not think that it was expected of the second respondent to provide such information free of charge. In all the circumstances I consider that the first respondent is correct in the interpretation which it attaches to paragraph 5.1.2 of the licence condition. Raising a fee in respect of such "enhanced directory listings" (or chargeable light type entries) does not constitute a breach of the licence condition. Nor can it be said that doing so is not authorised by the empowering provision.

[17] Mr **Beyleveld**, however, argues that, even if the first respondent is entitled to raise a fee in respect of the publication of such additional entries as chargeable light type entries it is not empowered to raise, in addition, an administrative fee to the applicant's customers, as opposed to members of the public.

[18] There is some dispute on the papers as to the merit of the reasons set out by the first respondent for its decision to raise an administrative charge. For purposes of the present application in which final relief is sought the version set forth by the first respondent must prevail where disputes of fact arise. (See **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).) In doing so, it must be accepted that the fee is raised by virtue of the volume of requests received from intermediaries and the difficulties which arise in the processing of such requests as enunciated in the letter of 21 April 2015 which is set out earlier herein. The licence conditions permit the first respondent to raise a charge in respect of the

provision of such enhanced directory listings and it lays down no limitation in respect of the manner in which the charge may be computed. In these circumstances I do not consider that the raising of an administrative fee to recover costs actually incurred in respect of the provision of listings for which charges may be raised constitutes a contravention of the licence provisions. In my view the empowering provision does provide for it.

[19] Finally, it is submitted that the decision to impose the administrative fee is taken for an ulterior purpose (section 6(2)(e)(ii) of PAJA). The foundation for this averment is contained in the founding affidavit in the following terms:

> "… [T]he First Respondent's decision to levy an administrative fee does not fall within the authorization to "*charge for advertising and for providing enhanced directory listings*". This charge relates to the actual cost of enhanced listings and/or advertising and does not relate to what the First Respondent contends is chargeable light type entries. In any event Clause 5.1.2 does not authorise the charging of an administrative fee in addition to the charge for enhanced and advertised listings. In any event, approximately 90% of the Applicant's applications it sends through to the First Respondent (as an intermediary on behalf of its customers) is in respect of free light type entries and whatever administrative burden the First Respondent contends for in processing the applications, the burden to process free light type entries is the same, if not more, than for processing lessor entries in respect of addition listings for which the First Respondent charges. The levying of the administrative fee is clearly designed to frustrate the Applicant's business practices and its operations and the First Respondent has the ulterior motive of preventing and/or dissuading the Applicant from placing as an intermediary, publications in the telephone directors (*sic*) for enhanced listings."

[20] I have already held that the publication of additional information in light print constitutes an enhanced listing as envisaged in the licence conditions and that the licence conditions do not lay down any limitation on the manner in which such charges may be computed. It may be true that the processing of free light type entries requires the same administrative process as chargeable light type entries. The first respondent, however, does not charge for the processing of free light type entries as that is precluded by the licence conditions. The charge in issue in the present application relates to those light type entries which are chargeable by virtue of them being "enhanced listings". There is, in my view, no factual basis upon which to conclude that the decision was taken for the ulterior purpose advanced by the applicant.

[21] In the result, I make the following order:

1. The application is dismissed.
2. The applicant is order to pay the costs of the application.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant:	Adv Beyleveld SC instructed by Jacques du Preez Attorneys, Port Elizabeth
For First Respondent:	Adv Preis SC instructed by Adams & Adams c/o Mike Nurse Attorneys, Port Elizabeth