**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

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|---|---|---|
| (1) | **REPORTABLE:** NO | |
| (2) | OF INTEREST TO OTHER JUDGES: NO | |
| (3) | REVISED: | |
| (4) | Signature: [redacted] | Date: 04/02/26 |

**CASE NO.:89542/2019**

In the matter between:

**MOBILE TELEPHONE NETWORKS (PTY) LTD** Applicant

and

**INDEPENDENT COMMUNICATIONS AUTHORITY**

**OF SOUTH AFRICA** First Respondent

**CHAIRPERSON OF THE INDEPENDENT COMMUNICATIONS**

**AUTHORITY OF SOUTH AFRICA** Second Respondent

**COMPLAINS AND COMPLIANCE COMMITTEE OF THE**

**INDEPENDENT COMMUNICATIONS AUTHORITY**

**OF SOUTH AFRICA** Third Respondent

CHAIRPERSON OF THE COMPLAINTS AND COMPLIANCE

COMMITTEE OF THE INDEPENDENT COMMUNICATIONS

AUTHORITY OF SOUTH AFRICA Fourth Respondent

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**JUDGMENT**

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**Kumalo J**

**INTRODUCTION**

[1]. This is a review application in which the Applicant seeks to review and set aside the decisions of the First and Third Respondents. The Third Respondent made a finding that the Applicant knowingly contravened regulation 9(1)(b) of the Standard Terms and Conditions for Individual Electronic Communications Services, 2010 of the Electronic Communications Act, and the First Respondent upheld said decision.

[2]. The Applicant was fined with a penalty of R5 million imposed in terms of regulation 12(1), of which R3 million was paid and R2 million suspended for a period of three years.

[3]. The Applicant's review application is based on PAJA and the principle of legality and alleges an unlawful approach to the evidence and a material error of law.

[4]. The Respondents oppose the application and argue that neither an unlawful approach to the evidence nor a material error of law was committed.

[5]. In 2018, the Applicant introduced a 1GB WhatsApp bundle for R10.00. There was an immediate, substantial demand for the bundle, which, according to the Applicant, resulted in an unforeseeable and unprecedented increase in network traffic.

[6]. The traffic growth was exponential and posed a material risk that the Applicant's core network could collapse, with catastrophic consequences.

[7]. The Applicant states that it considered infrastructure upgrades and attempted various technical solutions, none of which could reduce the risk to its network. It therefore opted to increase the price of the bundle from R10.00 to R30.00 to reduce demand.

[8]. In terms of regulation 9(1)(b) of the Standard Terms and Conditions for Individual Electronic Communications Services, 2010 ('the Regulations'), a price increase of this nature may not be implemented unless it has been filed with ICASA (the "First Respondent"), at least seven working days before the increase.

[9]. On 12 July 2018, the Applicant filed with the First Respondent its intention to increase the bundle tariff to R30. Its initial intention was to give effect to the increase on 21 July 2018. However, because of the immense operational difficulties it faced and the attendant risk of network failure, it stated that it was essential that the price increase be effected as soon as possible to alleviate the strain on the network. It implemented the tariff adjustments on 16 July 2018.

[10]. The Compliance and Consumer Affairs ("CCA") then commenced the proceedings, which resulted in a referral of the matter to the Third Respondent ("the CCC") and the decisions that are the subject of this review.

[11]. The hearing was held on 4 March 2019, and the Applicant presented the evidence of two witnesses, a Mr. Zoltan Miklos, its General Manager for Network Planning. Mr Miklos is allegedly an expert with an MSC in Electrical Engineering (Telecommunications).

[12]. The second witness was Divyesh Joshi, the General Manager: Financial Planning, Analysis, and Reporting.

[13]. The purpose of this judgment is not to regurgitate their evidence. It suffices to state that the Respondents did not lead any evidence to dispute the evidence of the Applicant's witnesses.

[14]. CCC made its recommendation to the First Respondent to dismiss the Applicant's consent defence on its interpretation that neither the relevant regulations, the Electronic Communications Act, nor the ICASA Acts grant the CEO of ICASA or the Council of ICASA the authority to grant an exemption to the regulations applicable.

[15]. Further, it concluded that the special offer made by the Applicant caused the crisis and that the Applicant should have foreseen it. The defence of necessity was also dismissed on the basis that the crisis was self-created and due to the Applicant's failure to foresee the consequences of the lower rate.

[16]. Before implementing the increase, the Applicant wrote to the First Respondent seeking permission to implement the price increase before the regulatory-prescribed seven-day period had lapsed. The First Respondent did not respond.

[17]. The Applicant proceeded to implement the increase despite the First Respondent's failure to respond to its request.

[18]. The First Respondent's Compliance and Consumer Affairs complained to the Complaints and Compliance Committee. The complaint was that the Applicant increased its price without providing the First Respondent with the required seven-day notice before implementation.

[19]. The Applicant raised the defence of necessity in the circumstances to avert a catastrophic network failure, that the First Respondent had tacitly consented to the early implementation of the price increase, and that its conduct amounted to substantial compliance with its duties in terms of the regulations and the Electronic Communications Act.

[20]. The CCC rejected the Applicant's defence on the basis that the Applicant was at fault for creating the crisis and should have foreseen the extent of the demand for the bundle. Further, it concluded that two working days fell substantially short of the seven working days required by regulation 9(1)(b).

[21]. The CCA recommended a fine of R500 000.00. However, the Third Respondent recommended a fine of R5 million.

[22]. It is alleged that the Third Respondent did so without affording the Applicant a proper or fair hearing in the circumstances where none of the evidence before it justified such a severe and disproportionate sanction.

[23]. The Applicant has set out various grounds of review, which it has compartmentalised into two, namely, the unlawful approach to evidence and the material error of law.

[24]. The unlawful approach to evidence is premised on its substantial compliance and necessity defences, which it argued ought to have been decided in its favour because the evidence it led at the hearing was uncontested and should have been accepted.

[25]. With respect to substantial compliance, it intended to comply with its statutory obligations under the Act. It was argued on its behalf that the purpose of the regulation is merely to afford the First Respondent proper notice of a tariff change, and the regulation does not require the Applicant to obtain the First Respondent's consent for the tariff change. Its conduct, accordingly, constituted a substantial compliance with its duties in terms of the Regulations.

[26]. The CCC found that the evidence of its experts supported the contention that the Applicant was at fault for creating the demand which led to the crisis. Its experts stated that the crisis arose from the WhatsApp's special offer.

[27]. The Applicant alleges that the CCC's decision is reviewable in terms of s6 (2)(e)(iii) of PAJA because irrelevant considerations were considered. I am unable to agree with the Applicant's submissions in this regard. The record

suggests that CCC did consider all relevant facts and even relied on the evidence provided by the Applicant.

[28]. There is also no merit in the argument based on s6(2)(f)(ii) that the decision is not rationally connected. The fact that the Applicant could not persuade the CCC that the launch of the WhatsApp R10 offer did not cause the crisis with which it was confronted does not mean that the CCC did not properly consider all the evidence before it.

[29]. The dismissal of the defence of substantial compliance cannot, in my view, be held to have been unreasonable in the circumstances. The relevant regulation requires a minimum of seven working days' waiting period, and the Applicant waited two days. It must also be considered that the letter addressed to the First Respondent requesting an indulgence was sent only on Friday after business hours, and that on Monday, the Applicant went ahead and implemented the tariff change without further attempts to engage the First Respondent. That does not put the Applicant in good standing.

[30]. Whilst I do not agree with the Respondent's interpretation that the CEO or the First Respondent does not have the power to condone the non-compliance with the prescripts of the regulations in question, I am of the view that the decision of the CCC in the circumstances can't be faulted.

[31]. My comments above are also applicable in relation to the Applicant's second ground of review regarding what the Applicant perceived as a material error of law. The Applicant had suggested that the First Respondent's failure to respond to its letter of 13 July 2018, wherein it requested the First Respondent

to waive the seven-day notice period, entitled it to assume that the First Respondent had acceded to its request.

[32]. As mentioned above, the letter was sent on a Friday after business hours and was apparently received by ICASA on 14 July 2018, which was a Saturday. The Applicant implemented the increase on 16 July 2018, having not received a response to its 13 July 2018 letter.

[33]. Whilst it may be that the matter was urgent, I am of the view that the conduct of the Applicant was unreasonable in these circumstances and agree with the Respondents' submission that a reasonable approach would have been for the Applicant to follow-up on its request rather than going ahead with the implementation taking into account that its letter of the 13$^{th}$ of July was sent after business hours. Surely, it could not have expected a response over the weekend or early Monday.

[34]. To assume under those circumstances tacit consent was misplaced. Thus, the decision of the Respondents cannot be faulted and is not reviewable under any of the grounds raised by the Applicant.

[35]. However, this is not the end of the matter. The Applicant raised a procedural challenge to the sanction imposed on it.

[36]. It is common cause that ICASA's Council did not give MTN any hearing or the opportunity to make representations before taking its decision. Despite this failure, ICASA endorsed the CCC's recommendation that increased the sanction recommended by the CCA tenfold. The CCA had recommended a fine of R500 000.00.

[37]. This Court is of the view that the Council ought to have allowed the Applicant to be heard in circumstances where it intended to increase the proposed fine tenfold. Its failure to do so rendered the sanction unfair and unlawful.

[38]. The Applicant argued that the increase was grossly disproportionate to the offence committed. It was further argued that the increase was based on material errors made by the Council, namely that the Applicant had acted deliberately and that it was at fault for creating the emergency and had profited from the situation.

[39]. Section 3(2)(b)(iii) of PAJA requires an administrator to give a person affected by its administrative action a clear statement of the administrative action that it intends to take.

[40]. The SCA in Esau and Others[1] has held that this section of PAJA requires that adequate notice of the intended administrative action be given to facilitate procedural fairness and the right to be heard:

> "*While 'no specific, all-encompassing test can be laid down for determining whether a hearing is fair, two fundamental requirements need to be satisfied before a hearing can be said to be fair, namely, there must be notice of the contemplated action and a proper opportunity to be heard'.*"

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[1] Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA593 (SCA) para 92

[41]. It is well established that procedural fairness entails that the person be given such information as is necessary to make their right to make representations meaningful.

[42]. I agree with the Applicant's contention that, without being informed that the CCC and Council were considering increasing by tenfold the quantum of a fine that the CCA recommended and being allowed to make representations on the appropriateness of that tenfold increase in quantum, MTN's right to procedural fairness was fatally impaired.

[43]. The Constitutional Court[2] has found that procedural fairness, of which the *audi alteram partem* principle is an incident, is not only a requirement of fairness, but also conduces to better decision making:

"Procedural fairness... is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially - a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy.'"

[44]. In Kadalie v Hemsworth[3], the court described how the failure to provide all relevant information would render the hearing futile:

[22] See Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC).
[3] Kadelie v Hensworth NO 1928 TPD 495

"A man cannot meet charges of which he has no knowledge; a man who has to give evidence that he is of a respectable and deserving character is merely beating the air if the tribunal before which he goes declines to give any indication of the points against him which have to be met."

[45]. The principles of fairness require that a decision-maker "should not, so to speak, 'keep anything up his sleeve', but should, on the contrary, put fairly to the persons concerned any points against them".[4]

[46]. In this matter, the Applicant was left in the dark as to the risk that there would be a tenfold increase in the sanction recommended by the CCA and was never allowed to make representations on the proportionality or appropriateness of that increase.

[47]. Where there is a right to be heard, the failure to afford a hearing vitiates the decision entirely.

[48]. Our highest courts have stressed that there is no scope for an argument that a hearing would have made no difference.

[49]. This Court accepts that the First Respondent's Council's members deliberations proceeded based on a material factual error.

[50]. It proceeded on the premise that the Applicant profited from its alleged contravention of the regulations. No such evidence was led in the tribunal or before the CCC. The evidence before the CCC was that the Applicant lost money because of the early implementation of the price increase.

[4] Sullivan v Wheat Industry Control Board 1946 TPD 194

[51]. The First Respondent's answering affidavit accepted that Councillors moved from the premise that the Applicant profited but asserted that this did not matter.

[52]. I agree with the Applicant's submission that the allegation that the false premise was immaterial or did not matter is unsustainable. It featured prominently in Council members' deliberations and was a significant factor the Council considered in justifying the R5m fine, which was a tenfold increase on the CCA's recommendation.

[53]. The law is clear: "If an administrative body takes into account any reason for its decision which is bad or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated."

[54]. Considering the above conclusions, this Court is of the view that it need not address the remainder of the issues raised by the parties in their papers.

[55]. The following order is made:

1. The decision of the First Respondent and/or the Third Respondent, dated 3 September 2019, that the Applicant contravened Regulation 9(1)(b) of Schedule 3 of the Standard Terms and Conditions for Individual Electronic Communications Services Regulations, 2010, as amended, is confirmed;

2. The decision of the First and Second Respondents imposing the following sanctions on the Applicant:

2.1 a fine of R5 million Rand of which R2 million is suspended for three years;

2.2 The fine of R3 million be paid to ICASA within ninety working days;

2.3 A desist order, effective for three years, is reviewed and set aside.

3. The matter is remitted back to the First Respondent to afford the Applicant a hearing in relation to an appropriate sanction for its failure to comply with the relevant regulation that is the subject of this matter; and

4. The costs of this application are to be paid jointly and severally by the First and Third Respondents on a party and party scale "C", including costs of two counsels.

[redacted]

**MP Kumalo**

**Judge of the High Court, Pretoria**

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

Appearances:

For the applicant: Adv G Marcus SC, Adv N Ferreira & Adv M Phalane

Instructed by: Webber Wentzel Attorneys

For the respondents: Adv W Mokhare SC & Adv N Makhaye

Instructed by: Motsoeneng Bill Attorneys Incorporated