

Not reportable

20 June 2008

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 11239/04

In the matter between:

TELKOM SA LIMITED

Applicant

and

**THE COMPETITION COMMISSION OF SOUTH
AFRICA**

First Respondent

**THE COMPETITION TRIBUNAL OF SOUTH
AFRICA**

Second Respondent

JUDGMENT

Delivered: 18th June 2008

R D CLAASSEN J:

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In this case the Applicant (“Telkom”) seeks the following relief:

1.1 Reviewing and setting aside the decision of the First

Respondent (“the Commission”) that culminated in it referring a complaint to the Second Respondent (“the Tribunal”) on 23 February 2004 under case number CC 2002/May 57 and CC 2002/August 194 (“*the referral*”);

1.2 Reviewing and setting aside the referral;

1.3 Declaring that:

1.3.1 The First Respondent did not have the power to refer the matters forming the subject of the referral to the Second Respondent;

1.3.2 The Second Respondent does not have the powers or competence in law to adjudicate on the conduct forming the subject matter of the referral and to grant any remedy consequent upon such adjudication;

1.3.3 Ordering such of the Respondents that oppose this application to pay the Applicant’s costs jointly and severally (two counsel).

The Commission opposed the application and raised two points *in limine*. The Tribunal did not oppose the application and abides the decision of the Court. Telkom was represented by Mssrs D Unterhalter SC and S Cockrell and the Commission by Mssrs M Brassy SC and N H Manaetje.

At the outset I want to make it clear that I will make liberal use of counsels' heads of argument. They are two senior silks and both are extremely competent and eloquent. I can do no better than use their wordage phraseology. I may add, they have consented thereto.

Telkom's case was outlined more or less as follows by Mr Unterhalter. They seek two basic forms of relief. Firstly, review and setting aside of the decision of the Commission that culminated in a complaint referral and of course the complaint referral itself. Secondly, it seeks a declarator to the effect that the Commission did not have the power to make the complaint referral and that the Tribunal does not have the power to adjudicate on the complaint referral. Its primary submission is that the subject matter of the complain referral falls within the exclusive jurisdiction of the Independent Communications Authority of South Africa ("*ICASA*") and outside the jurisdiction of the Tribunal and the Commission. If that submission is not upheld its alternative arguments are that the complaint referral was vitiated on the following grounds that:

- 4.1 The Commission failed to comply with the peremptory provisions prescribed in its agreement with ICASA;
- 4.2 The Commission's reliance on the report of the Link Centre created a reasonable apprehension of bias;
- 4.3 The Commission did not make the complaint referral within the period prescribed in the Competition Act;

4.4 The decision to refer itself, is invalid for want of proper procedures.

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The points *in limine* raised by the Commission are:

5.1 Neither the decision to refer nor the referral itself are administrative acts subject to review;

5.2 The forum to raise Telkom's objections and review is the Tribunal and not the High Court.

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This whole case falls within the electronic communications industry.

Certain role players within the industry complained to the Commission that

Telkom was abusing its monopolistic role in the industry. The complaints as such can be summarised as follows:

1. Telkom refuses to provide telecommunication facilities to value added network service ("VANS") providers unless they conclude a standard form contract with Telkom. (Certain contractual provisions are then referred to.)

(Section 8 (b) and (c) of the Competitions Act 89 Of 1998)

2. Telkom's refusal to lease access facilities directly to Van's Providers;

Section 8(b) and (c) and Section (h)(d)(i) of the Competitions Act 89 Of 1998)

3. Telkom's price discrimination/excessive price fixing for its services;

(Section 8 (a) and (c) and/or 9 of the Competitions Act 89 Of 1998)

4. Refusal to peer with other Van's operators.

(Section 8 (b) and (c) of the Competitions Act 89 Of 1998)

The relevant provisions of the Competition Act provide as follows:

“8. Abuse of Dominance Prohibited :

It is prohibited for a dominant firm to –

- a) charge an excessive price to the detriment of consumers;*
- b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
- c) engage in an exclusionary act other than an act listed in paragraph G if the anti- competitive if the effect of that act outweighs its technological efficiency or other pro-competitive gain, or*
- d) engage in any of the following exclusionary acts, unless the firm concerned can show technological efficiency or other pro-competitive gains which outweigh the ante competitive effect of its act:*

- i) *requiring or inducing a supplier or customer to not deal with a competitor;*
- ii) ...
- iii) ...
- iv) ...
- v) ...

9. *Price discrimination by Dominant Firm prohibited:*

- 1. *An action by a dominant firm as the seller of goods or services, is prohibited price discrimination, if –*
 - (a) *it is likely to have the effect of substantially preventing or lessening competition;*
 - (b) ...
 - (c) ...”

To understand the issues better it is necessary to set out in rather full detail the statutory and regulatory framework within which these issues are to be

viewed. This was very aptly done by Telkom's council and I refer to paragraphs 18 to 40 of the heads of argument that reads as follows:

“Post Office Act:

18. *Telkom was established in terms of the Post Office Act 44 of 1958.*

19. *Section 4 of the Post Office Act transferred to Telkom the “Telecommunication enterprise” of the State (i.e. “all the assets, liabilities, rights and obligations... of the State which relate to or are connected with the conduct of the telecommunications service by the Department [of Communications]”).*

20. *Prior to this appeal by the Telecommunications Act 103 of 1996, Section 78(1) of the Post*

Office Act provides as follows:

'Subject to the provisions of any other Act of Parliament [Telkom] shall have the exclusive privilege of conducting, maintaining or using, or of authorising any person to construct, maintain or use, any telecommunications line for the sending, conveying, transmitting, or receiving of sounds, images, signs, signals, communications or other information ...'

21. *Section 4(1)(a) of the Post Office Act provided that: 'Subject to the provisions of any other law, Telkom would have 'the exclusive power to conduct the telecommunications service'.*

The Telecommunications Act:

22. *The Telecommunications Act 103 of 1996 (the Telecommunications Act) commenced operation on 1*

July 1997. It was in force at the time when the complaint referral was made.

23. In terms of Sections 36(1)(a) of the Telecommunications Act, Telkom was deemed to be the holder of a licence to provide public switched telecommunications services (PSTSS) as contemplated in Section 78(1) of the Post Office Act. Section 36A defined what was meant by a 'public switch telecommunications service'. Significantly this definition included the provision of telecommunication facilities used for the provision of value added network services (VANS).

24. Value added network services

(VANS) were regulated by Section 40 of the Telecommunications Act.

24.1 The Telecommunications Act was amended in 2001 so as to introduce the following definition: 'Value added network service' means that telecommunications service provided by a person over a telecommunication facility, which facility has been obtained by that person in accordance with the provisions of Section 40(2) of the Act, to one or more customers of that person concurrently, during which value is added for the benefit of the customers, which may consist of –

(a) Any kind of technological intervention that would act on the content, format, protocol or similar aspects of the signals transmitted or received by the customer in order to provide those customers with additional, different or restructured information;

b) The provision of authorised access to and interaction with, processes for storing and

retrieval of text and data;

c) Managed data network services

(For laymen, like me, it refers to entities such as “Mweb” that provide internet services and the like to the public.)

24.2 In terms of Section 40(1)(a) Telkom was deemed to be the holder of a licence to provide (subject to subsection 3) the VANS provided by it immediately before the date of commencement of the Telecommunications Act;

24.3 In terms of Section 40(1)(b) any person who provided a VANS in terms of an agreement with Telkom immediately prior to 20 May 1996 was deemed to be the holder of a licence to provide the service in question. These persons were required to apply to ICASA for a licence to provide the relevant services by no later than 1 January 1998.

25. *Section 44 of the Telecommunications Act imposed a range*

of obligations on Telkom in relation to the making available of telecommunication facilities.

25.1 Section 44(2) provides as follows:

'Telkom ... shall, when requested by any other person providing a telecommunication service, including a private telecommunication network, lease or otherwise make available, telecommunication facilities to such other person pursuant to an agreement to be entered into between the parties, unless such request is unreasonable.'

25.2 The effect of this provision was that Telkom was obliged to make telecommunication facilities available to any other person providing a telecommunication services and (including a VANS provider) when requested to do so, 'unless such request [was] unreasonable'

25.3 Section 44(3) incorporated the provisions of sub-sections 43(1)(b)(i) and (ii), (c) and (c).

These provisions made it clear that ICASA would be the arbiter in the event of any dispute between Telkom and the VANS provider regarding the reasonableness of a request that Telkom should make available its telecommunication facilities in terms of Section 44(2).

26. *Section 100 of the Telecommunications Act granted ICASA the power to investigate and adjudicate upon an alleged contravention by a licensee of its obligations. These powers would be activated, for example, if a VANS provider were to allege that Telkom had breached its obligation to make telecommunication facilities available in terms of Section 44.*

27. *The Telecommunications Act conferred on ICASA various powers in relation to competition matters:*

27.1 *Section 36(1)(d) provided as follows:*

‘Where it appears to the authority that Telkom, in the provision of its telecommunication services, is taking or

proposing to take any step which confers or may confer on it an undue advantage over any person who may in future be granted a licence in competition with Telkom, the Authority may direct Telkom to cease or refrain from taking such step, as the case may be.'

27.2 Section 53(1) of the Telecommunications Act provided as follows:

"If it appears to the authority that the holder of a telecommunication licence is taking or intends taking any action which has or is likely to have the effect of giving an undue preference to or causing undue discrimination against any person or category of persons, the authority may, after giving the licensee concerned an opportunity to be heard, direct the licensee by written notice to seize or refrain from taking such action, as the case may be."

Telkom's PSTSS Licence:

28. On 7 May 1997, the PSTSS licence envisaged in Section 36

of the Telecommunications Act was granted to Telkom (‘the PSTSS licence’)...

29. *Paragraph 3(1) of the PSTS licence conferred the following privileges on Telkom for a 5-year ‘exclusivity period’:*

‘Subject to the Act and to the other provisions of the licence Telkom is authorised to provide on an exclusive basis for a period of 5 years from the Effective Date the following elements of the Public Switch Telecommunication Service:

- a) the National Long Distance Telecommunication Service;*

- b) the International Telecommunication Service;*

- c) the Local Access Telecommunication Service;*

- d) the public pay telephone service*

- e) all or any telecommunication facilities to be used by any person for the provision of Value Added Network Services;*

f) *All or any telecommunication facilities comprising fixed lines to be used by any operator for the provision of Mobile Telecommunication Services; and*

g) *All or any telecommunication facilities to be used by any person for the provision of any Private Telecommunication Network, other than a Private Telecommunication Network referred to in Section 41(2)(b) of the Act.'*

30. *The 'effective date' was 7 May 1957.*

31. *Notwithstanding determination of the exclusivity period, Telkom continues to enjoy various rights under the PSTS licence. We shall refer to relevant rights below [although a new licence has been authorised, for purposes of this case, it was common cause that Telkom must be regarded throughout as the sole licensee].*

The Electronic Communications Act, 36 of 2005:

32. *The Electronic Communications Act, 36 of 2005 ("the ECA") commenced operation on 19 July 2006. It repealed the*

Telecommunications Act in its entirety.

33. *Section 92(1) of the ECA provides that licences granted under the Telecommunications Act remained valid under the ECA until such time as they are converted by ICASA. A converted licence must be 'on no less favourable terms' than the current licence (Section 93(1)).*
34. *ICASA had not yet converted Telkom's PSTS licence or the licences granted to the various VANS operators. It follows that those licences continue to exist at the present time. Section 93(11) of the ECA provides that existing licences 'remain subject to all terms and conditions associated with such licences but are not inconsistent with this Act.'*
35. *Chapter 8 of the ECA regulates the leasing of electronic communication facilities. It imposes various obligations on an electronic communications network service licensee (such as Telkom). In particular it provides that an electronic communications network service licence 'must, on request, lease electronic communications facilities to any other person*

licensed in terms of this Act and persons providing services pursuant to a licence, exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable’.

36. *Chapter 8 imposes regulatory powers in ICASA in circumstances where there is a dispute regarding the reasonableness of a request to lease electronic communications facilities. For example, ICASA is empowered to ‘determine the reasonableness’ of any request to lease electronic communications facilities by having regard to whether the requested lease:*

- *Is technically and financially feasible;*
- *Will promote the efficient use of electronic communication networks and services*

37. *Section 67 of the ECA confers on ICASA various powers in order to promote competition in the electronic communications industry.*

Independent Communications Authority of South Africa Act:

38. *For the sake of completeness we point out that ICASA was established by the Independent Communication Authority of South Africa Act 13 of 2000.*

39. *ICASA took over the regulatory functions that has hitherto been performed by the South African Telecommunications Regulatory Authority ("SATRA").*

40. *ICASA formerly exercised various powers under the Telecommunications Act, and currently exercises various powers under the ECA. We have referred to the relevant powers above."*

To this list must obviously be added the Competitions Act No. 89 of 1998.

Section 3 thereof provides the whole base for the Commission's alleged entitlement to adjudicate these issues. Section 3 reads as follows:

“3. Application of Act:

(1) *This Act applies to all economic activity within, or having an effect within, the Republic, except –*

(a) *collective bargaining within the meaning of Section 23 of the Constitution and the Labour Relations Act 1995;*

(b) *A collective agreement, as defined in Section 213 of the Labour Relations Act 1995; and*

(c) *Concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.*

(1A)(a) *Insofar as this Act applies to an industry, or captor of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has*

jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct;

b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of Sections 21(1)(h) and 82(1) and (2)."

(My emphasis)

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It will be convenient at this stage to deal with the Commission's points *in limine*. The first one is that the Commission's decision to refer the complaint and the referral itself are not subject to review as an "*administrative act*". Telkom made it quite clear that the application for review is brought squarely within the ambit of the Promotion of

Administrative Justice Act 3 of 2000 (“PAJA”). For its submission the Commission relies firstly on the conclusions reached in the case of **Simelane and Another NNO v Seven-Eleven Corporation of South Africa (Pty) Ltd 2003 (3) SA 64 SCA**. The following is said at paragraph [17] page 77 G – H:

*“I cannot do better than refer to what is said in the **Norvatis-case** for the reasons there stated it is clear that in a case such as the one we are concerned with, the function of the Commission is investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like. Seven-Eleven should husband its powder for the contest before the Tribunal” (my emphasis).*

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Before coming to the abovementioned conclusion **Schutz JA** quotes *in extenso* from the judgment in the Competition Tribunal in the case of **Norvatis SA (Pty) Ltd and Others v The Competition Commission and Others (CT 22/CR/B/JUN01, 2.7.01 at paragraphs 7 and 35 to 61)**. At paragraph [14 H – J] Schutz J A states the following:

*“The reasons for the Tribunal’s decision in the **Norvatis-case** deal at length not only with the underlying question whether the functions of the Commission are determinative as opposed to investigative, but also with more specific questions which have arisen in the appeal before us. Speaking generally and without reference to all conceivable specific cases, I approve of these reasons. Once they are adopted, in my opinion they largely dispose of all but one of the arguments raised by Seven-Eleven.”*

The first issue the Competition Tribunal had to deal with was whether the referral constituted an administrative act subject to review. Based on cases such as **Chairman, Board of Tariffs and Trade and Others v Brenco Incorporated and Others 2001 (4) SA 511 (SCA)** and **Van Der Merwe and Others v Slabbert NO and Others 1998 (3) SA 613 (N)** the Tribunal came to the conclusion that the Commission performs an investigative function not determinative. Therefore except for the presence of “*Ill-faith, oppression, vexation and the like*” the decision to refer it is not reviewable.

Mr Unterhalter relied on the case of **Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 315 (SCA)** where it is submitted that the SCA had given a new definition of "Administrative Act". At para [23], page 323 D – F the following is stated:

[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

Great emphasis for purposes of the submission was placed on the words capacity. The following is stated in the replying affidavit. In paragraph 47 page 474 of the papers:

"I am advised that in terms of Section 50(2)(a) of the Competition Act the Commission is obliged to refer the complaint to the Tribunal if the Commission 'determines that a prohibited practice has been established". The Commission, in taking the decision culminating in the referral, and subsequently referring a complaint to the tribunal, thus exercises public power or performs a public function in terms of

an empowering provision (to use the terminology in PAJA). These are actions by themselves have the capacity to effect Telkom's rights a referral launches a of administrative consequences for the person being referred, for instance, it is compelled to provide evidence under oath, it has to submit its private business affairs and documentation to the scrutiny of the public and possibly even its competitors, culminating in a decision (by the Tribunal) on an administrative penalty.

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This argument seems to have some credence, until it is analysed. The cases referred to, all emphasise that the relevant administrative act must have direct and immediate effect on legal rights. None of the “*plethora of administrative consequences*” referred to in the quotation, really affects legal rights as such. What the referral does do is to give Telkom an opportunity to defend its rights before the Tribunal. The consequences referred to by Telkom are certainly consequences that affect Telkom but the obligation (if it is such) to present evidence and submit confidential

information, certainly do not by themselves affect any rights of Telkom, at least not any that cannot be protected by hearings, (even *in camera*), and the like. As Mr Brassy submitted, all the processes prior to the decision are not materially different to any pre-trial procedures in normal Court proceedings.

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In any event, the Commission's decision to refer did not affect any of Telkom's rights to do business or use any of its property as usual, or perform any function in terms thereof. In fact, the "*plethora of consequences*" also refer to possible future interests that might be affected. As stated in the **Grey's Marine** case at paragraph [30], page 326

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[30] While 'rights' may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that. It has not been shown that any rights - or even prospective rights - of any of the appellants (or of any other person) have been adversely affected by the Minister's decision. None of the appellants has any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their own premises have been unlawfully compromised. As pointed out in Kyalami Ridge, at para [95]:
'The general rule is that the reasonable use of property

by an owner is not subject to restrictions, even if such user causes prejudice to others.'

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For those reasons I do not think that the Commission's decision to refer, or the referral itself, involves a reviewable administrative act. Therefore the first point *in limine* succeeds.

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The Second point *in limine* was perceived by Telkom to mean that the High Court does not have the jurisdiction to hear this matter at all. In his heads of argument Mr Brassy clearly puts the Commission's submissions as follows at paragraph 103 and 104, pages 79 to 80:

"103. The second preliminary point is not an objection to the

jurisdiction of this Court as Telkom understands it. It has a submission that, given the technical and complex nature of the question whether the complaints referred to the Tribunal would constitute contraventions of the Competition Act if proved, it would be preferable for this question to be determined by the Tribunal. It is significant for this purposes (sic) that Parliament has conferred the authority to investigate, evaluate, refer and adjudicate complaints relating to alleged contraventions of Chapter 2 of the Competition Act the specialist bodies comprising the Commission, the Tribunal and the Competition Appeal Court (the CAC).

104. The determination of whether or not a matter involves the contravention of Chapter 2 of the Competition Act may, in certain instances such as the present, be complex and technical. In those instances the Court should not likely deprive the Tribunal of the authority to determine whether the complaints referred in fact involve possible contraventions of Chapter 2 of the Competition Act. Due deference ought to be accorded to the expertise of the Commission and the Tribunal in this

regard. It is in this sense that the Commission submits that it would have been appropriate, perhaps preferable, for Telkom to raise the objection as to the Tribunal's jurisdiction at the commencement of the complaint proceedings before the Tribunal. Exercising its specialist authority under the Act, the Tribunal would determine whether or not the matters fall within its authority, i.e. whether or not, technical and complex as they are, they involve possible contraventions of Chapter 2 of the Competition Act. To assist it in the determination, the Tribunal would be entitled to receive expert evidence and input, which the Court has not been favoured with at this stage. Its decision would then be subject to the view on PAJA to the extent that it is inpunable."

Mr Brassy in effect answered this point himself by conceding that this Court does have jurisdiction to hear this case even though the Tribunal might have been the “*appropriate or even preferred*” venue to hear this case. Since the matter was fully argued at the request of both counsel there is no point in referring it to the Tribunal now on that question alone. The second point *in limine* is therefore dismissed.

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Before dealing with the main argument based on the jurisdiction of the two entities or authorities, it is convenient to firstly consider one or two of the alternative arguments raised by Telkom. The second alternative argument is based on the bias, or rather the “*reasonably perceived bias*” on the part of the Commission when deciding to refer the complaints to the Tribunal.

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BIAS

The background of the perceived bias on the part of Telkom is that the Commission made use of an entity styled the Link Centre of the University of the Witwatersrand as being its telecommunications experts. Telkom, upon being informed of this, immediately raised concerns about the Link Centre's objectivity in the matter. The reason was that it had existing relationships with some of the complainants and the members of the Advisory Board (of the Link Centre) have in the past spoken out very strongly and negatively about Telkom's operations and specifically in relation to some of the matters raised in the complaints. These allegations have been admitted by the Commission. It is not necessary to set them out in any great detail but the following extracts can be mentioned.

- 18.1 Telkom's profits are outrageous;

- 18.2 Telkom is getting rid of its marginal customers i.e. the poor and it is not providing universal access to them as it claims to be;

- 18.3 By using its monopoly illegally, Telkom has sought to retard

the growth of the VANS and the internet sector;

18.4 There is no reason to believe that even when the market is opened up, Telkom will not use its dominant position to club competitors and ride rough shod over ICASA;

18.5 Anti-competitive behaviour by Telkom in the VANS segment of the market continues to have a chilling effect on the growth of its competitors.

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The Commission's answers to these allegations can be summarised as follows:

19.1 There is no evidence that the Commission simply rubber

stamped the Link Centre's recommendations, and Telkom could not deny that it obtained outside legal advice;

19.2 The period of time it took the Commission to come to a finding is reason enough to show that it came to an independent decision;

19.3 The contents in the Link Centre's report reveals no manifest bias. It is a reputable research centre and its reputation is not "*seriously*" challenged by Telkom;

19.4 The Commission is not precluded from taking partisan material into account in its decision.

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The basis of Telkom's complaint about bias is based on the statement in the 7/11-case *supra* that the Commission's decision can only be reviewed in case of "*ill-faith, oppression, vexation or the like*". Mr Unterhalter submitted that *bias* is part of the '*like*' and may even be a stronger base than ill-faith, oppression or vexation. I agree that bias is or can be part of the "like" situation.

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To decide whether bias in this case vitiates the Commission's decision two things need to be established:

21.1 Why would vitiate ill-faith, oppression and vexation vitiate a decision of this nature;

21.2 Does bias fall within the same specific category and with the same results.

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To my mind ill-faith, oppression and vexation vitiate a decision because it will cause the decision (*in casu* to refer) to be based on matters like wrongfully obtained evidence, directly or indirectly, wrongful pressure or influence brought to bear on a witness or “accused”, etc. The list is not exhaustive. Therefore decisions affected thereby are to be set aside although they do not affect the proprietary rights. When analysed, the conception of bias falls into the same category, because it can have the same results underlying the referral.

23.

When considering bias, the test is very simple: would a reasonable person, apprised of the true facts, come to that conclusion? As already stated, the first thing that strikes me is that none of the four grounds would in this specific case be determinative of Telkom’s rights. The rights as such would only be determined by the Tribunal.

As already stated the negative assertions made by the Advisory Board members of the Link Centre, are admitted. It is admitted that some of the complainants contribute financially (to a very small extent) to the Link Centre. Telkom was not furnished with the “*legal advice*” obtained by the Commission. Neither were they furnished with the Link Centre’s draft report. It is also common cause that the Link Centre’s Advisory Board includes employees of the complainants in the SAVA complaints. In its answering affidavit the Commission admits these allegations and says Ms Gilwald (from the Advisory Board) will explain these issues. In her affidavit however, she really only says that there is no point in entering into a “*tit for tat*” relation with the individuals referred to by Telkom. Furthermore, most of the Link Centre’s recommendations are transferred almost verbatim into the Commission’s decision.

To my mind the common cause facts are sufficient, on its own, to create an apprehension of bias. The trouble is that the Commission has not put up any substantial material to waylay these impressions or apprehensions. The answers referred to above by the Commission do not cut ice. In the first place it is not alleged that the Commission simply rubber stamped the Link Centre’s recommendations. However, rubber stamping as such is not

a requisite for bias. Telkom does not have to prove that much. Where the Commission almost verbatim copied the recommendations of the Link Centre, it constitutes one ground for a possible bias. In the second instance the period of time it took the Commission to come to a finding, proves absolutely nothing. It could have been pure dilatoriness on their part in not coming to a decision. In the third place the contents of the Link Centre report does not have to reveal any manifest bias on the reading thereof. It is sufficient if external factors create the possibility of such bias on the part of the Commission. As for the partisan material it is certainly true that the Commission can obtain its own independent and partial or partisan information. However if it discloses that source and the source is tainted, then certainly the source can be the object of a perception for bias. Therefore on the facts before me I find that there are reasonable grounds for apprehension by Telkom that the Commission was biased in coming to a decision to refer the matter to the Tribunal.

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That decision really disposes of the whole application and it is not necessary to deal with the other issues. However, since I strongly suspect that this matter will not end here, it may be prudent and useful to give my conclusions on some of the other points.

REFERRAL OUT OF TIME:

It is common cause that the referral by the Commission was made outside the one year prescribed by the Competitions Act. The Commission's answer is that it obtained a consent from all the complainants concerned. When the so-called consent by the various people who have given such consent is analysed, it is clear that they did not represent all the complainants, although they claimed to have. On this ground also the Applicant must succeed. It is common cause that this outcome is fatal to the Commission's case.

FAILURE TO COMPLY WITH THE PEREMPTORY PROVISIONS OF THE MEMORANDUM OF AGREEMENT:

The words of the Act certainly convey the sense that there must be compliance with the agreement. On the face of it, it is peremptory. It is also clear that there was no proper "*consultation*" between the two authorities as to the way forward, neither did the Commission convey its

final decision to deal with the complaint itself, to the relevant parties. The question that comes to mind is whether the proper procedure should not have been to compel ICASA to implement and set those proceedings in motion. This question is not answered and to my mind is not necessary to decide. Having come to that conclusion, this whole issue really becomes academic and it is not necessary to decide the issue.

29.

For those reasons the application must succeed to the extent set out below. It is common cause that the costs should be granted in favour of the successful party on the basis of two counsel.

30.

I therefore make the following order:

1. The First Respondent's decision to refer the complaints referred to it, to the Competition Tribunal is set aside;
2. First Respondent is to pay the Applicant's costs including the

costs of two counsel.

R D CLAASSEN

Judge of the High Court