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NOT IN MY BACKYARD – A POSTSCRIPT

In our TMT Alert sent on 5 November 2012 we reported on the Supreme Court of Appeal decision in the matter of *SMI Trading (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd*.

The import of the decision is that any electronic communications network service licensee is permitted to enter private property to construct and maintain a network in terms of s22 of the Electronic Communications Act, No 36 of 2005 (ECT Act) without the consent of the landowner. The right of a licensee to enter private land is not without limitations as any decision taken by a licensee constitutes administrative action and must therefore be procedurally fair and comply with the prescriptions of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

At the very least, a licensee must give the landowner advance notice of its proposed administrative action and give the landowner an opportunity to be heard before taking the decision to enter the landowner's land.

A short while after the publication of the *SMI Trading* decision, a spokesperson for Mobile Telephone Networks was reported as saying that, in addition to the right to enter upon private property without the landowners' consent, licensees were not required to pay compensation to affected landowners. The statement was no doubt based on the finding of the court that the exercise of rights in terms of s22 of the ECT only amounted to deprivation of property and not expropriation. Compensation is payable when property is expropriated. There is no requirement to compensate a landowner in the case of deprivation of property.

Notwithstanding that the exercise of s22 rights may not amount to expropriation of property, compensation remains relevant to the procedural fairness of the licensee's decision to enter land.

Arbitrary deprivation is illegal and contrary to s25 of our Constitution. A failure to offer or pay compensation is likely to take the decision on the part of a licensee into the realm of arbitrariness. Occupation of land by a licensee without compensation to the landowner may also be regarded by our courts as an abuse of the s22 statutory powers amounting to arbitrary conduct.

A court may review and set aside a decision to enter land if, among other things, the decision was taken in a manner that was procedurally unfair, arbitrary or unreasonable when measured against the standard of a reasonable administrator. A court may also prohibit the licensee from acting in a particular manner, refer the matter back to the licensee for further consideration, make declarations on the right of the parties, grant a temporary interdict, or, in exceptional circumstances, either substitute the licensee's decision with its own or direct the licensee to pay compensation to the landowner.

The decision of a licensee that offers reasonable compensation to a landowner (even if that offer is refused) is much less likely to fall foul of PAJA.

In summary, while a licensee may assert that compensation is not payable if it deprives a landowner of full enjoyment of its property pursuant to the provisions of s22, it does so at its own peril as its decision to enter land or to remain in occupation of land without paying compensation to the landowner may well be regarded as arbitrary and capable of being set aside by our courts.

Kathleen Rice

IN THIS ISSUE

JUST A CLICK AWAY - ONLINE SHOPPING

The world of online transactions is expanding with growing numbers of consumers transacting online to purchase goods and services.

As online transactions become more pervasive it also becomes increasingly important that both consumers and online vendors become more fully acquainted with rights and obligations applicable to online transactions.

Few eager shoppers stop to consider the risks involved in adding another item to their virtual shopping cart or in providing their personal details to seemingly reliable business websites. Regulatory frameworks over the world are, for this reason, being tailored to protect consumers even in circumstances where consumers purchase goods or services on impulse and later regret the purchase.

The South African Constitution, the Consumer Protection Act, No 68 of 2008, the Electronic Communications Act, No 36 of 2005, and the Electronic Communications and Transactions Act, No 25 of 2002 (ECT Act) are all applicable to electronic transactions and the protection of consumers who transact online. The Protection of Personal Information Bill will further flesh out consumers' rights to privacy and obligations applicable to businesses that have access to personal data. It is imperative that businesses selling goods or services online be cognisant of their legal obligations when marketing and supplying goods or services to consumers online.

The ECT Act provides that businesses offering goods or services for sale by way of an electronic transaction must make certain information available to consumers on the website where the goods or services are offered. The information that ought to be made available to consumers includes:

- the full name, legal status, physical address and telephone number of the business
- any code of conduct to which the business subscribes and how that code of conduct may be accessed electronically by the consumer
- a sufficient description of the main characteristics of the goods or services offered to enable a consumer to make an informed decision on the proposed electronic transaction
- the full price of the goods or services, including transport costs, taxes and any other fees or costs
- the manner of payment
- any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers
- the security procedures and privacy policy of the business in respect of payment, payment information and personal information.

Online businesses must provide consumers with an opportunity to review the entire transaction, correct any mistakes or to withdraw from the online transaction. The business offering goods or services online may be liable for any damage suffered by a consumer for failure by the business to utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction. Further, consumers have a cooling-off period of seven days of receipt of goods to cancel their entire transaction without penalty or reason.

Most countries have developed, or are in the process of developing, legislation that will affect every business as it diversifies on the Internet. When an online consumer purchases goods and/or services a plethora of jurisdictions could potentially be involved in the transaction, either through shipping, deliveries or transferring of monies electronically, which have their own online communications and transactions legislation to regulate the electronic communications and the transaction. It is therefore of utmost importance that online business owners become fully cognisant of the electronic communication laws which will apply most regularly to their everyday transactions.

As businesses expand and consider changing their business models either by diversifying physical stores by offering the same goods or services online, or choosing to embark on new online businesses, the regulatory impact has to be considered. It may be helpful for businesses to ask the following questions to ascertain what the regulatory impact will be:

- Will any goods or services be sold online to South African consumers?
- How will consumers sign up to purchase the goods or services?
- What types of terms and conditions will regulate the provision of goods and services?
- When and where do consumers have access to the terms and conditions of the goods or services being provided?
- How will consumers accept to the terms and conditions of the provision of goods or services?
- How will the consumer's data be collected, stored, accessed and protected?
- Where will the customer's data be stored?

Access to the world of online markets is just a quick and easy 'click' away. Compliance with applicable legislation is not that quick and easy for online vendors particularly given rapidly evolving legislation and the global nature of online shopping.

Tayyibah Suliman, Mariska van Zweel, Nicole Meyer

THREATS TO PRIVACY AND FREEDOM OF EXPRESSION – A FAMILY AFFAIR

A number of Bills are before Parliament that have the very real potential to inhibit the free flow of information and ideas on electronic communications networks while allowing the state to monitor and intercept certain online communications, such as communications using Gmail, Facebook, Twitter, and Skype, without a warrant or any form of judicial oversight.

The ugly sister

The 'ugly sister' of the Protection of State Information Bill (State Information Bill), the draft General Intelligence Laws Amendment Bill (GILAB) also known as the 'Spy Bill', is being debated by the Ad Hoc GILAB Committee this month. GILAB proposes that the National Strategic Intelligence Act, No 39 of 1994 be amended to allow the State Security Agency to collect and analyse so-called 'foreign signals intelligence' in accordance with the 'intelligence priorities of the Republic'. 'Foreign signals intelligence' is defined in GILAB as being intelligence derived from the interception of electromagnetic, acoustic and other signals and includes any communication that emanates from outside the borders of the Republic or passes through or ends in the Republic. The 'intelligence priorities of the Republic' is a vague and undefined concept.

The Regulation of Interception of Communications and Provision of Communication-Related Information Act, No 70 of 2002 (RICA) provides that, subject to certain exceptions, no person may intentionally intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission. RICA provides that security services may not intercept electronic communications without judicial authorisation.

On the face of it, it would seem that RICA would apply to all electronic communications regardless of its origin. In practice, however, the Minister of State Security and the State Security Agency have made it abundantly clear that they regard RICA as having domestic application only and that bulk monitoring and interception of communications of foreign communications (which would include applications with servers based in foreign countries such as Gmail, Skype, Twitter and Facebook) may take place without a warrant or any other form of judicial oversight.

There is no express provision in GILAB to the effect that the collection and analysis of foreign signals intelligence be subject to RICA.

Electronic communications is, by its very nature, bidirectional. The use by persons in South Africa of any applications/services which have servers situated in a foreign country or the exchange of information with a person in a foreign country inevitably results in signals being sent that are of foreign origin even if the communication is initiated in South Africa.

The right to privacy is a universal human right that is protected by our Constitution. It applies to any person within South Africa and to South Africans outside the Republic's borders. Given the stance taken by state intelligence structures that RICA does not apply to foreign communications, GILAB should expressly state that the interception of foreign signals intelligence is subject to RICA. Failure to subject the interception of foreign signal intelligence to RICA will leave the door open to unconstitutional intrusions upon the right to privacy. In the absence of safeguards against unlawful infringements of the right to privacy in the context of foreign signals intelligence will inevitably result in the limitation of the right to freedom of expression.

The unattractive cousins

Provisions of both the Independent Communications Authority of South Africa Amendment Bill 2012 and the Electronic Communications Act Amendment Bill 2012 also contain provisions that, if enacted, will potentially constrain the right to freedom of expression. In this context the Bills can be cast as the unattractive cousins to the State Intelligence Bill and GILAB.

The existence of an independent regulator of electronic communications (which includes broadcasting) underpins the right to freedom of expression. Electronic communications services and broadcasting services afford persons in every walk of life a rapid and reliable means of receiving and/or exchanging ideas and information. Section 192 of the Constitution guarantees independent regulation of broadcasting in the public interest in order to ensure fairness and diversity of views broadly representing South African society. The independence of Independent Communications Authority of South Africa (ICASA) is constitutionally guaranteed. This Constitutional guarantee is affirmed in ICASA's enabling legislation which provides that ICASA is independent subject only to the Constitution and the law and requires ICASA to perform its functions without fear, favour or prejudice. ICASA must, in addition, function without any political or commercial interference.

In terms of current legislation, ICASA is bound to consider the Minister's policy directions and directives and, accordingly has discretion to implement these directions and directives. Proposed amendments to the Electronic Communications Act will require ICASA to implement ministerial directions and directives.

Also in terms of current legislation, ICASA is mandated to constitute the Complaints and Compliance Committee that deals with complaints and issues related to non-compliance on the part of licensees. The Complaints and Compliance Committee makes recommendations to ICASA that it may, in its sole discretion, accept or reject. Proposed amendments to the ICASA Act provide for the establishment of a Complaints and Compliance Commission that will replace the Complaints and Compliance Committee. In terms of the ICASA Bill, the Minister (and not ICASA) must establish the new Complaints and Compliance

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Commission and appoint a chairperson. If the ICASA Bill is enacted ICASA's independence will be usurped by the fact that the Complaints and Compliance Commission will be empowered to require ICASA to amend or revoke licences. Whereas the Complaints and Compliance Committee currently makes non-binding recommendations to ICASA for its consideration, the Complaints and Compliance Commission is empowered to make decisions which would be binding on ICASA.

Absent an independent regulator of electronic communications, the means by which ideas and information are freely exchanged as well as persons who provide electronic communications services, network services and broadcasting services will be exposed to potential political interference that would inhibit the free exchange of ideas and information thus limiting the right to freedom of expression.

Kathleen Rice

COMPETITION COMMISSION GRANTED THE POWER TO CONDUCT MARKET REVIEWS AS OF 1 APRIL 2013

The Independent Communications Authority of South Africa (ICASA) and the Competition Commission have concurrent jurisdiction on matters relating to mergers and complaints that are founded on conduct that could lead to a lessening of competition in the electronic communications industry.

The issue of whether ICASA should exercise jurisdiction in respect of issues relating to alleged 'anti-competitive conduct' that has already occurred is contentious. Suggestions have been made that ICASA's powers to regulate competition be limited to functions that are aimed at preventing anti-competitive conduct and that the adjudication of alleged anti-competitive conduct that has already occurred be left within the domain of the Competition Commission.

The relationship between ICASA and the Competition Commission is governed by a memorandum of understanding concluded in 2002. The memorandum of understanding is outdated and does not fully address the complex relationship between ICASA and the Competition Commission nor does it contain any provisions relating to the conduct of market reviews or inquiries.

ICASA has the power to conduct market reviews in terms of the Electronic Communications Act, No 36 of 2005 to determine whether markets or market segments have ineffective competition. ICASA may also conduct inquiries into competition–related issues in the electronic communications sector in terms of the Independent Communications Authority of South Africa Act, No 13 of 2000 (ICASA Act). If ICASA makes the determination that a market or market segment has ineffective competition ICASA may impose pro-competitive measures including the imposition of pro-competitive conditions on licensees.

Section 6 of the Competition Amendment Act, No 1 of 1999 inserted Chapter 4A into the Competition Act, No 89 of 1998 that authorises the Competition Commission to conduct market inquiries. The Competition Commission may institute a market inquiry if it has reason to believe that any feature or combination of features of a market for any goods or services prevents, distorts or restricts competition. Market inquiries may also be instituted to achieve the purposes of the Competition Act. Following on the market inquiry, the Competition Commission may make recommendations for new or amended policy, legislation or regulations and may, in addition, make recommendations to other regulatory authorities (which would include ICASA) in respect of competition matters. The Competition Commission may also initiate complaints based on information is obtained during the market inquiry.

The provisions of s6 of the Competition Amendment Act that inserted Chapter 4A did not come into operation when the Competition Amendment Act was enacted. The President has now fixed 1 April 2013 as the date on which s6 (and consequently Chapter 4A) will come into operation.

With the coming into force of Chapter 4A, there will be an even greater overlap of functions performed by the Competition Commission and ICASA. At the very least the memorandum of understanding concluded between ICASA and the Competition Commission ought to be revisited so that market reviews and inquiries can be co-ordinated between the two bodies.

Kathleen Rice

THINK BEFORE YOU POST… PRIVACY AND SOCIAL MEDIA

"Privacy is dead, and social media holds the smoking gun" Pete Cashmore

As highlighted in the recent decision by the Honourable Willis, J in the South Gauteng High Court matter of *H v W (12/10142) [2013] ZAGPJHC 1 (30 January 2013)*, South African courts are having to take account of the changing realities of technology and society so as not to lose credibility. As part of the judgment, Willis J stated that "[w]ithout credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom."

The matter before the court involved an allegation of defamation by the applicant in respect of a 'post' relating to his personal life made by the respondent on Facebook (the global social media site). The respondent alleged that the post was not intended to defame the applicant but rather "in order for the applicant to reflect on his life and the road he had chosen."

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The applicant approached the court for an order interdicting the respondent from posting any further information in respect of the applicant on Facebook or any other social media site (failing which, that the respondent be placed under arrest for a period of 30 days or such longer period as the court may determine) and compelling the respondent to remove the post from Facebook and any other social media site, failing which, that the sheriff of the court be ordered to remove the postings. In a letter by the applicant's attorney addressed to the respondent, reference was also made to a possible claim of damages by the applicant.

The court was required to apply common law principles relating to privacy in reaching a determination as to the applicant's claims. In the judgment it is acknowledged that there is a lack of South African case law dealing with social media related issues and that the common law needs to be developed in accordance with constitutional principles.

The right to privacy is a fundamental right which has been entrenched in the South African Constitution. In reaching a decision on whether the applicant had been defamed, the court had regard to decisions by the Constitutional Court in terms of which the right to privacy and the close link between human dignity and privacy is recognised.

In its finding, the court held that the post by the respondent was indeed defamatory towards the applicant and that the defences to defamation did not apply in that the post, whether true or not, could not be considered to be to the public benefit, nor in the public interest and the respondent was not able to provide justifaction for the post. The court states that the background between the parties coupled with the words themselves indicated that the respondent acted out of malice or improper motive when the offending comments about the applicant were posted. The court also held that the post was unlawful.

In its determination as to whether the relief sought by the applicant should be granted, the court was satisfied that the first two requirements for an interdict had been met in that the applicant had a clear right to privacy and reputational protection and the applicant had shown that he had a reasonable apprehension that he would suffer irreparable harm if the interdict was not granted. The court then had to consider whether any remedy other than an interdict was available to the applicant. In this regard, the respondent alleged that damages would be a proper remedy. The respondent further argued that the applicant could have approached Facebook, reported the defamatory post and requested the posting to be blocked.

The court did not support the respondent's argument and held that no other remedy would have the same effect as issuing an interdict and ordering the removal of the posting and also that an interdict would serve to resolve the issue without the "needless expense, trauma and delay that are likely to accompany an action for damages in cases like this." In addition, the court ruled that there was no evidence to assure the court that Facebook would comply with a request to remove the posting and that "if one wants to stop wrongdoing, it is best to act against the wrongdoers themselves."

The respondent was accordingly ordered to remove the post relating to the applicant from Facebook and all other social media sites and to pay the applicant's costs for the application. The court did not, however, agree to interdict and restrain the respondent from making future posts relating to the applicant through social media nor that the sheriff be ordered to remove the post. In this regard, the court noted that it was not sure whether the sheriff of the court would be in the position to remove the post to the extent that the respondent failed to do so. The court welcomed the applicant to approach the court should the respondent fail to comply with the order granted.

This judgment highlights that, although Facebook and other forms of social media have afforded users the platform to share information, thoughts, opinions and photographs, the world of social media is not immune from legal sanction. As stated by Willis J "those who make postings about others on the social media would be well advised to remove such postings immediately upon the request of an offended party." Our law protects every person's right to dignity and tranquil enjoyment of his/her piece of mind, but also every person's right to his/her reputation, including that which is enjoyed through social media.

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