IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

BEFORE:

HON. R.H. SHEIKH, JUDGE/CHAIRMAN

PROF. J.M.L. KIRONDE, MEMBER

MRS. P. KASONDA, MEMBER

CONSOLIDATED TRIBUNAL APPEAL NO. 2 AND 4 OF 2011

(1) VODACOM TANZANIA LIMTED)
(2) ZANZIBAR TELECOM COMPANY LIMITED.....) APPELLANTS

VERSUS

TANZANIA COMMUNICATIONS REGULATORY AUTHORITY.....RESPONDENT

30/11/2012

Coram:	Hon. R.H. Sheikh, J/Chairman
	Hon. Prof. J.M.L. Kironde, Member
	Hon. P. Kasonda, Member
Appellants:	Vodacom (T) Limited & Zantel Telecom Co. Limited
For the Appellants:	Ms Hadija Kinyaka, Advocate
	FK Law Chambers
Respondent:	Tanzania Communications Regulatory Authority
For the Respondent:	Mr. Nelson Ndelwa, Advocate
	C&M Advocates

T/C: Beda Kyanyari

JUDGEMENT

This consolidated appeal arises from two separate but similar decisions of the Tanzania Communications Regulatory Authority (TCRA) made on 17/03/2011. The two appellants VODACOM TANZANIA LIMITED (Vodacom) and ZANZIBAR TELECOM COMPANY LIMITED (Zantel) jointly referred to herein as "the appellants" being aggrieved by the two almost identical decisions of the Tanzania Communications Regulatory Authority, the respondent, filed on 27/4/2011 Appeals No. 2 of 2011 and 4 of 2011 respectively in this Tribunal against the whole of the decisions of the respondent. The two appeals were consolidated by consent of both parties on 15/05/2012 under the provisions of rule 20 of the Fair Competition Tribunal Rules, 2006.

TCRA (the respondent) a regulatory authority, is a body corporate established under section 4 of the Tanzania Communications Regulatory Authority Act No.12 of 2003 (hereinafter also referred to as the Act or the TCRA Act) charged under Section 5 of the Act with the duty, in carrying out its functions as a regulator, to strive to enhance the welfare of Tanzania society by promoting effective competition and economic efficiency and protecting the interests of consumers and efficient suppliers, *inter alia.*

The functions of TCRA are set out in section 6(1) of the Act, which are as follows:-

(a) to perform the functions conferred on the Authority by the sector legislation;

(b) subject to the sector legislation-

(i) to issue, renew and cancel licences;

(ii) to establish standards for regulated goods and regulated services;

(iii) to establish standards for the terms and conditions of supply of the regulated goods and services;

(iv) to regulate rates and charges;

(v) **to make rules for carrying out the purposes and provisions of this Act and the sector legislation;**

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(h) **To administer this Act.**

(i) ..... (Emphasis by Tribunal)

The relevant parts of section 17 and 18 of the Act provide:-

S.17.-(1) **Where the Authority has reasons to believe that a person is capable of supplying information, producing a document or giving evidence that may assist in the performance of any of its functions, any officer of the Authority may, by summons signed by the Director General or Secretary of the Authority served on that person, require that person-**

(a) to furnish the information in writing, signed by him, in the case of a body corporate, signed by a competent officer of the body corporate;

(b) to produce the document to the Authority;

(c) to appear before the Authority to give evidence.

(2) A summons under this section shall specify the required time and manner of compliance.

(3) **The Authority may require that any evidence referred to under this section to be given on oath or affirmation, and in that case, the Director General, the Secretary or any officer of the Authority may administer the oath or affirmation.** (Emphasis by Tribunal)

(4) Any person shall not be excused from complying with summons under this section on the grounds that compliance may tend to incriminate the person or make the person liable to a penalty, save that information, documents and evidence provided in answer to a summons will not be admissible in any proceedings against the person other than proceedings

under this Act, sector legislation, the Fair Competition Act, 2003 or any environment protection legislation.

(5) Any person who without lawful excuse, refuses or fails to comply with a summons under this section, commits an offence and is liable on conviction to a fine of not less than the equivalent in Tanzanian shillings of United States dollars five hundred or to imprisonment for a term not less than six months or both such fine and imprisonment.

(6) Where the Authority has reason to believe that a person is in possession or control of any information or document which may assist in the performance of its functions and that person has refused or failed to supply such information or document, the Director General, Secretary or any officer of the Authority may apply to the Fair Competition Tribunal or a competent court for issuance of a warrant authorizing a police officer to enter into any premises believed to contain or into which a document is kept or hidden and conduct search and make copies or take extracts of documents therein.

(j) (7) On application under subsection (6), the Chairman of the Tribunal or any authorized person, may, on application issue a warrant authorizing any police officer to forcibly enter the premises to conduct the search and make copies or take extracts of documents there in.

(k) (8) Any person, who knowingly gives false or misleading information or evidence in purported

compliance with a summons under this section, commits an offence.

18.-(1) The Authority may conduct an inquiry where it considers it necessary or desirable for the purpose of carrying out its functions.

(2) The Authority shall conduct an inquiry before exercising power to-

(a) grant, renew or cancel a licence with an exclusivity period or universal service obligation;

(b) regulate any rates or charges;

(c) adopt a code of conduct. (Emphasis by Tribunal).

The appellants are limited liability companies engaged in and carrying on the business of suppliers/providers of telecommunication services. The brief undisputed background to this consolidated appeal is as follows:-

In 2010 a new law to govern the electronic and postal communications sector was enacted. This act namely the Electronic and Postal Communications Act No. 3 of 2010 (EPOCA) commenced on 18/06/2010. This Act, among other things, makes it mandatory for telecommunication operators to register all their subscribers. Pursuant to section 47 of the Tanzania Communications Regulatory Authority Act 2003 (TCRA Act) the respondent issued Compliance Orders dated 26/01/2011 to the appellants in which it was stated that the appellants had knowingly caused to be used certain unregistered SIM cards contrary to the provisions of section

131 of EPOCA. In the Compliance Orders aforesaid the respondent also directed the appellants to appear before it and show cause why legal action should not be taken against them for contravening the provisions of EPOCA by causing to be used unregistered SIM cards. Following hearings conducted on 2/02/2011(Vodacom) and 3/02/2011 (Zantel) respectively the respondent gave its decisions on 17/03/2011 in which by separate letters it ordered the appellants:

(a) Not to cause to be used in the United Republic of Tanzania unregistered SIM cards;

(b) To deactivate immediately all unregistered SIM cards in the market and submit a report of compliance to the authority within one week from the date of the order; and

(c) To continue to register SIM cards and activate them only after registration.

In their separate memorandums of appeal the appellants raised three grounds of appeal in which they are contending that the respondent lacked the powers to make the impugned decision, that in finding the appellants guilty of an offence under section 131 of EPOCA the respondent had wrongly assumed criminal jurisdiction to determine the criminal culpability of the appellants, that EPOCA does not confer upon the respondent the jurisdiction to try offences under it which jurisdiction is vested exclusively in the courts of law (ground 1(a)), that the respondent had wrongly

extended to the appellants the criminal responsibility for the offence under section 131 of EPOCA which provision is intended to place responsibility on persons who use or cause to be used unregistered SIM cards, that is on the seller and user of unregistered SIM cards and not the appellants (ground 1(b)), that the order for the deactivation of all SIM cards held in stock was made without authority of the law (ground 1(c)), that the respondent had improperly constituted itself as prosecutor and judge thereby rendering the decision a nullity *ab initio* (ground (2)) and that the respondent had acted unlawfully and arbitrarily and in excess of its authority by demanding compliance with its order within one week thereby disregarding the appellants' right to contest the decision by appeal in this Tribunal (ground 2(b). Lastly it is contended that the decision was not based on evidence and that the users of the mobile phone numbers listed in the charge served upon the appellants were not called to testify either as offenders or witnesses as to whether or not they had in fact not registered the said numbers (ground 3).

The respondent has resisted the appeal. In the Reply to the respective appellants' memorandums of appeal the respondent has maintained that the decision complained about cannot be faulted, that it has the requisite powers to make the orders under the provisions of section 45(1) of the TCRA Act as amended by section 179(a) of EPOCA and that it did not erroneously assume criminal jurisdiction or wrongly

extend criminal culpability to the appellants, nor was the order for deactivation of all unregistered SIM cards made without authority of law nor did it (TCRA) act arbitrarily as contended by the appellants, that the decision was made in the exercise of the regulatory powers conferred upon the respondent under the cited provisions of the law and that there was ample evidence that the appellants had knowingly caused to be used unregistered SIM cards contrary to the law.

At the hearing, the appellants were represented by Prof. Luoga assisted by Ms Kinyaka both of FK Law Chambers while the respondent was represented by Mr. Chaula of C & M Advocates.

The complaints that the order of deactivation of the SIM cards held in stock was made without authority of law (ground 1(c)) were marked abandoned on 31/01/2012 upon application by Prof. Luoga learned counsel for the appellants.

In his oral submission in support of the appeal Prof. Luoga learned counsel citing sections 45 and 48 of the TCRA Act as amended and section 131 of EPOCA submitted that the respondent had wrongly assumed criminal jurisdiction since neither the TCRA Act nor EPOCA confer power upon the respondent to try criminal offences. He added that section 48 of the TCRA Act as amended creates an offence against the TCRA Act whereas section 131 of EPOCA creates an offence for causing to be used unregistered SIM cards and

section 45 of the TCRA Act as amended gives the TCRA powers to make a compliance order where a person has committed or is likely to commit an offence against the TCRA Act or any sector legislation. Prof. Luoga argued that since the TCRA Act and EPOCA make provision for sanctions for the offences upon conviction of the accused person and do not create any separate courts to try such offences, the word court, which is used in both the TCRA Act and EPOCA, must be construed to mean ordinary courts vested with criminal jurisdiction. Learned counsel for the appellants further asserted that once the respondent has reason to believe that an offence has been committed, it has no jurisdiction to deal with the matter otherwise than setting in motion criminal proceedings in a competent court of law in accordance with the prescribed criminal procedure. Prof. Luoga argued that the respondent had misled itself and wrongly assumed that it had two options under the laws that is, **one** to set in motion criminal proceedings through the office of the DPP and **two**, the making of compliance orders in the exercise of its administrative powers, whereas the two pieces of legislation clearly state that if a person contravenes the law he or she must be charged for such contravention and upon conviction suffer the prescribed criminal penalties.

With respect to the complaint about the extension of criminal responsibility to the appellants, learned counsel for the appellants submitted that criminal law cannot extend by the application of the law of agency except under section 48 (5) of

the TCRA Act which provides for vicarious criminal liability in relation to offences charged on a body corporate and that the incidence or obligation of SIM cards registration does not reside with the appellants as registration takes place at selling points and is done by outlet sellers who then transmit registration forms to the appellants for verification and ultimately the registration. Prof. Luoga argued that the fact that an outlet seller had sold a SIM card without registering the same is something which is not known to the appellants until it is brought to their notice and therefore in the present case no *mens rea,* an element which is mandatory for establishing the offence, has been shown on the part of the appellants, and that if the respondent had identified the users of the unregistered SIM cards, it ought to have charged the users and distributors of the same instead of the appellants.

In arguing the second ground of appeal, learned counsel for the appellants submitted that it is a cardinal rule of justice that you cannot be a judge in your own cause and therefore, the respondent's act of accusing, charging, prosecuting and pronouncing judgment against the appellants is contrary to the rule against bias which is in fact the reason the respondent is not empowered by the law with the jurisdiction to try criminal offences. Learned counsel was emphatic that by demanding compliance with its orders within one week the respondent had acted unreasonably and in an arbitrary manner.

With regard to the third ground of appeal, learned counsel for the appellants argued since the appellants had extensively notified the respondent about various issues/constraints pertaining to the registration exercise such as the fact that the registration exercise was being carried out all over the country at once while forms filled were only processed at the headquarters, that EPOCA required verification before uploading the filled forms into the system, that there are no verifiable identities from various users and that the use of obsolete technology could not handle electronic processing of registration forms, the respondent could not have reasonably decided that an offence was being committed under such circumstances in total disregard of the information provided to it. Prof. Luoga asserted that all the information provided by the appellants negates the presence of knowledge on the part of the appellants and only confirms that the appellants cooperated with the respondent to ensure that the anomaly of having unregistered SIM cards was rectified and that during the transitional period. It is his argument that enforcement powers should be carefully applied as transition is not an overnight exercise and the verification which is required by the law to be done by the appellants is still an ongoing exercise.

Learned counsel further added that whereas the compliance order envisaged by the law is a preventive order or directional order which is enforceable as an order of the High Court, in the case at hand the respondent had issued a summons to appear instead and improperly applied section 45 of the TCRA Act to

initiate criminal proceedings and had wrongfully assumed criminal jurisdiction without powers to do so.

The respondent brought one witness. Ms NAPALITE MAGINGO, (RW1) a Frequency Management Scientist in the respondent's Information Communication Technology Section, who testified that the respondent is mandated to assign numbers to mobile operators licensed to operate within the country, that it also manages the national numbering plan and that the numbers are used for routing calls, identifying the mobile network operator, identifying the subscriber, billing and charging and providing value added services and further that the respondent provides a distinct number called mobile network destination call to network operators in Tanzania, examples being 071 for MIC and 075 for Vodacom, for identification purposes. According to RW1 the network operators manufacture SIM cards and provide them to the subscriber or dealer but the licensed network operator remains in control as it is not possible to access the network without involving the operator. RW1 further testified that SIM cards sold in the streets have distinct numbers which connect users to their respective networks upon switching the mobile phone on and that authentication and activation of SIM cards is done by the core network at the mobile operator's station who has the power to allow or deny access to the network, that it is the network operators who have the control of all communications done by their subscribers and that the network operator is the one who controls communications services in the market and can

activate, de-activate and block SIM cards at anytime through the system.

In his oral submissions on the contention regarding the lack of powers of the respondent in making the decision (ground one), Mr. Chaula learned counsel for the respondent submitted that the respondent indeed had powers to make the impugned decision under the provisions of section 45 (1) of the TCRA Act as amended by section 179 of EPOCA which empower the respondent to make compliance orders when satisfied that an offence has been committed or is likely to be committed under the TCRA Act or a sector legislation. Learned counsel for the respondent further argued that since compliance orders can only be made after the respondent has satisfied itself that an offence has been committed or is likely to be committed, something which can only be achieved after investigating or receiving evidence from the person(s) concerned, the respondent cannot be faulted for summoning the appellants to appear before it. Learned counsel asserted that the respondent issued compliance orders to the appellants to require them to show cause why legal action should not be taken against them for allowing the use of unregistered SIM cards and that the appellants responded to the respondent's request and made their submissions in which they clearly admitted that there were unregistered SIM cards in use in the market. Mr. Chaula argued that apart from RW1's testimony to the effect that a SIM card cannot be used by a subscriber unless it is activated by an operator the admission by the appellants that there were

unregistered SIM cards in the market confirms that the appellants had knowledge that there were unregistered SIM cards in the market especially since there is evidence that the appellants are in control of communications and can allow access or deny access to the network in question. Mr. Chaula asserted that there is ample evidence that the appellants knowingly caused the use of unregistered SIM cards in contravention of section 131 of EPOCA.

On the issue of options available to deal with offenders of the relevant laws learned counsel for the respondent argued that as the respondent legally has two options as stated in the impugned decisions, **one,** to commence criminal proceedings through the DPP under section 48 of the TCRA Act and 131 of EPOCA or **two**, to exercise its regulatory powers by issuing compliance orders under section 45 of the TCRA Act, the argument by learned counsel for the appellants that the respondent had no such powers is baseless.

With respect to the contention that the respondent had improperly constituted itself as complainant, prosecutor and judge (second ground), while conceding that it is a cardinal rule of law, as stated by learned counsel for the appellants, that a person cannot be judge in his own cause, Mr. Chaula submitted that there are exceptions to the rule such as where the law has vested powers to make certain decisions solely on a single body such as in the present case where the law has vested the power to make compliance orders on the respondent

as a regulator and nobody else. Citing the Supreme Court of Canada case of **Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1998] 1 S.C.R. 3**, learned counsel for the respondent asserted that a biased judge is preferable to no judge at all under the doctrine of necessity which is discussed at length in the cited case. Mr. Chaula further added that powers to deal with offences under the TCRA Act and EPOCA are given to the respondent for purposes of ensuring speed and deterrence of offences against the TCRA and EPOCA Acts and that the appellants cannot in this appeal raise the issue of bias as they had impliedly waived that by submitting to the jurisdiction of the respondent. Mr. Chaula argued that the respondent did not act unreasonably or arbitrarily by demanding compliance with its orders within a week as it had complied with the requirement to accord the appellants a fair hearing before making the decisions and that as de-activation of unregistered SIM cards is not time consuming, as it is done through the system and does not entail someone traveling throughout the country, the one week given to the appellants is reasonable for implementing the order and the appellants were therefore obliged to give effect to the order regardless of their intention to institute further action by way of appeal as expressly provided under the provisions of section 42(5) of the TCRA Act as amended by section 178 of EPOCA.

On the complaint about the decision not being based on evidence produced (ground three) learned counsel for the

respondent maintained that the decisions were based on evidence and argued that since the appellants clearly admit in their submissions before the respondent that there were unregistered SIM cards in the market and undertook to phase them out or de-activate them then it cannot be claimed that the decision(s) were made in disregard of the evidence produced especially considering that the orders that were given in the decisions complained about are mere warning in nature and substance. Lastly learned counsel for the respondent submitted that the challenges faced by the appellants during the registration exercise should not be used as excuses for contravening the law.

In his rejoinder, learned counsel for the appellants reiterated that the powers given to the respondent under section 45 of the TCRA Act as amended by section 179 of EPOCA are restricted to making preventive and directive orders, that if a compliance order is not complied with the respondent can only impose a fine and not assume criminal jurisdiction to try offences under the TCRA Act and EPOCA which jurisdiction is exclusively conferred upon a court as defined in the Constitution of the United Republic of Tanzania and the Interpretation of Laws Act, CAP 1 2002 R.E, that what the respondent issued to the appellants were not compliance orders as envisaged by the TCRA Act, that they do not meet the legal requirements provided therein and that the alleged compliance orders were summonses which were followed by criminal proceedings improperly conducted by the respondent

without jurisdiction since criminal jurisdiction is vested upon ordinary courts of law and governed by the Criminal Procedure Act Cap. 20 R.E 2002. Learned counsel for the appellants further reiterated that sections 48 of the TCRA Act and 131 of EPOCA merely create offences and do not envisage that the respondent would be constituted as a court nor do the aforesaid provisions give two options to the respondent in dealing with offences therein and further that sections 45 and 48 of the TCRA Act and section 131 of EPOCA do not empower the respondent to investigate, receive evidence from the appellant, prosecute and judge and that had the provisions given to the respondent such powers, then the provisions would be offensive and contrary to the rule against bias.

Learned counsel for the appellants also argued that counsel for the respondent had wrongly construed the written submissions by the appellants as confessions, that written submissions are not evidence but reasoned arguments and that if a statement is intended to be used against a person as evidence then it must be preceded by a cautioned statement which in any case could not have been possible in this case since a cautioned statement is only admissible as evidence in criminal proceedings before an ordinary court which is the court vested with the jurisdiction to try criminal cases.

On the issue of bias, Prof. Luoga was firm that the case cited by learned counsel for the respondent is irrelevant since before applying the doctrine of necessity, **firstly,** one must have

jurisdiction to try the proceedings which the respondent lacked, **secondly**, he must be under an obligation to act impartially which jurisdiction the respondent, being a regulatory authority, also lacked, and **lastly** he must have no other option available which is not the case in the present appeal. Prof. Luoga urged upon this Tribunal to disregard the testimony of RW1 and to find that RW1 testimony failed to establish the presence of *mens rea* on the party of the appellants and at best informed the Tribunal about the mobile network *modus operandi.* He further reiterated that the order to deactivate all unregistered SIM cards within one week was unreasonable and arbitrary considering that the 'law permits an appeal against the respondent's decision within 28 days as provided under section 61 (3) of the Fair Competition Act, 2003. Lastly it is Prof. Luoga's assertion that the appellants never waived their right to raise the issue of bias by submitting to the jurisdiction of the respondent as claimed by learned counsel for the respondent and that an objection to the jurisdiction of the respondent was raised by Vodacom right from the beginning as shown in the proceedings before the respondent.

We have carefully evaluated the evidence on record including that of RW1 and the respective arguments advanced by learned counsel within the context of the applicable statutory framework including the TCRA Act 2003, EPOCA and the Interpretation of Laws Act Cap.1 2002 R.E which are reproduced hereunder.

Sections 42(5) and 45 of TCRA Act as amended by sections 178 and 179 of EPOCA respectively, section 48 of TCRA as amended by section 179 of EPOCA and section 131 of EPOCA provide:

> Section 42(5)- Any decision of the authority in exercising regulatory powers granted under this Act shall be given effect to, whether or not the aggrieved party institutes or intends to institute an action in a court of law, quasi judicial body or makes any further representations to the Authority after the decision is made.
>
> Section *45(1)- Where the Authority is satisfied that a person has committed or is likely to commit and offence against this Act or a sector legislation it may make a compliance order under this section.*
>
> > *(2) Any person against whom a compliance order is made shall comply with the order.*
> >
> > *(3) A compliance order may require a person to refrain from the conduct which is in contravention of the provisions of this Act or regulations made under this Act or sector legislations to take actions required to be taken in order to comply with this Act or to pay fine as assessed by the Authority.*

(4) A compliance order shall be made in writing specifying the grounds for its making and shall be enforceable as an order of the High Court.

(5) A copy of a compliance order shall be placed on the Public Register and a copy shall be served on the person against whom it is made.

(6) Notwithstanding the provisions of any law to the contrary, where an order or a certified certificate is produced or submitted to High Court, the order or certificate shall be conclusive proof of its making by the High Court and of the facts to which it relates.

(7) Any person who willfully delays or obstructs an inspector or a police or other authorized officer in the exercise of powers conferred upon him by or under this Act; commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding twenty four months or to both that fine and that imprisonment.

(8) A court convicting a person of an offence under this Act may, in addition to any penalty that it may impose, order the forfeiture to the government of any electronic communication or broadcasting apparatus or other material in

relation to it in connection with or by means of which the offence was committed.

(9) Notwithstanding sub-section (2), no order of forfeiture shall be made where it is proved that the broadcasting apparatus in question is not owned by the person so convicted, and if the owner proves that he did not have any knowledge of the unlawful use of the apparatus by the person so convicted and could not have reasonably prevented such use.

Section 48(1)- Any person who contravenes or fails to comply with a provision of this Act, commits an offence against this Act and is liable on conviction to a fine of not less than the equivalent Tanzanian shillings of United States dollars three thousand or imprisonment for a term not less than twelve months or to both such fine and imprisonment.

(2) A person shall commit an offence against this Act if he-

(a) aids, abets, counsels or procures;

(b) conspires with others;

to commit an offence against this Act.

(3) Any person, who suffers loss or damage as a result of an offence against this Act, may recover by compensation for such loss or

damage from the person who committed that offence whether or not that person has been convicted of an offence.

(4) Any person, making a claim under sub-section(3) within four years after the loss or damage is suffered or within four years after the person becomes aware of the offence, whichever is the later, claim shall be made by way of a complaint provided for under section 40 of this Act.

(5) Where a person charged with an offence under this Act is a body corporate, every person who, at the time of commission of the offence was a director, manager or officer of the body corporate may be charged jointly in the same proceedings with such body corporate and where the body corporate is convicted of the offence, every such director, manager or officer of the body corporate shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.

(6) For the purposes of this section, any partner of a firm shall be jointly and severally liable for the acts or omissions of any other partner of the

same firm done or omitted to be done in the course of the firm's business.

(7) For the purpose of the provision of this section, a penalty for non- compliance of an order of the Authority made under this Act shall be a fine which shall be equal to a civil debt as assessed by the Authority.

Section 131- Any person who knowingly uses or causes to be used an unregistered SIM card commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand Tanzanian shillings or imprisonment for a term not exceeding three months. (Italics byTribunal).

On the issue of the assumption by the respondent of criminal jurisdiction and constituting itself as prosecutor and judge we must disagree with the appellants. While it is true that the respondent as a regulator has no criminal jurisdiction to try an offence created under section 131 of EPOCA which jurisdiction is vested in the ordinary courts, it is our view, that in this case at no time did the respondent in fact assume criminal jurisdiction or purport to act as a prosecutor or a court of law. What it did was to issue a document it called "Compliance Order" to the respective appellants informing the appellants that it had noted that the appellants had knowingly caused to be used unregistered SIM cards and directing them to appear before the authority to show cause why legal action should not

be taken against the appellants for contravening the provisions of EPOCA. It is undisputable that under section 45(1) of the TCRA Act the respondent as a regulator is empowered to issue compliance orders where it is satisfied that a person has committed or is likely to commit an offence against the TCRA Act or a sector legislation. A compliance order is an order requiring a person to refrain from conduct which is in contravention of the provisions of the TCRA Act or a sector legislation and may require a person to take actions which comply with the law or to pay a fine as assessed by the respondent (authority) and has to be in writing (section 45(1)(3) and (4) of the TCRA Act as amended). By issuing a compliance order the respondent did not, in our view, institute criminal proceedings nor did it assume criminal jurisdiction but in fact exercised the powers conferred upon it as a regulator or public law enforcer under the TCRA Act. Indeed as a regulator, under sections 45 of the TCRA Act and 131 of EPOCA, the respondent has the option of dealing with offences in the regulated sector in the manner it deems fit, it may issue a compliance order or depending on the circumstances it may institute criminal proceedings through the DPP's office. It has, under section 17 of the TCRA Act, the power to obtain information, documents and evidence from any person(s) that may assist in the performance of its functions as a regulator and it may for this purpose by **summons** require any person to appear before it to give evidence and/or furnish the information required in writing and it may also investigate in the form of a

hearing. In the present case the respondent clearly did not commence criminal proceedings. What the respondent did was to exercise its power to obtain information by issuing a summons under section 17 of the TCRA Act followed by the procedure provided under the aforesaid section. Under sections 4(2), 6, 7, 17 and 18 of the TCRA Act the respondent is a body corporate with powers to regulate and investigate and in the course of investigation to question and hear the persons concerned and make decisions with the objective of promoting and enforcing compliance with the TCRA Act and the sector legislation. The respondent is a quasi judicial body in the sense that it is part –judicial and part-administrative and whenever it conducts an investigation or a hearing under sections 17 and 18 (public hearing) of the TCRA Act leading to a decision it does so in its capacity as a regulator and in pursuance of its functions of administering the TCRA Act and sector legislations and enforcing compliance with the aforesaid Acts. Indeed nowhere in the initial summonses which were wrongly entitled "Compliance Order" and the decisions dated 17/03/2011 does the respondent purport to make findings of guilty. The orders made in the decisions dated 17/03/2011 and challenged in this joint appeal are purely regulatory and cannot, in our view, amount to findings that the appellants were guilty of the offence under section 131 of EPOCA.

Having said that we will add without further *ado* that we agree entirely with learned counsel for the appellants that the notices or "summonses" issued to the appellants were erroneously

called "Compliance Orders". What were termed "Compliance Orders" issued to the respective appellants were in fact nothing but summonses/notices to appear and show cause that were followed by a hearing(s)/submissions by the appellants and ultimately the respective decisions of 17/03/2011 the contents of which are, in our view, in compliance with the requirements of section 45(1)(3) and (4) of the TCRA Act as amended. It is these decisions which should have been termed "Compliance Orders" and not the summonses/notices. However, this omission/error does not in any way prejudice the rights of the appellants as they were accorded a fair and just hearing by the respondent by first being given a summary of what was claimed to be contravened and summons to appear and defend themselves.

With respect to the second part of the first ground of appeal, that is the contention that the respondent extended criminal responsibility to the appellants in contravention of the law which places such responsibility on the seller and the user of the unregistered SIM cards and not directly on the appellants, we find that there was no extension of criminal responsibility to the appellants. Section 131 of EPOCA concerns those who knowingly use or cause to be used unregistered SIM cards. The extent of the obligations imposed on these two categories of persons is provided under another provision in EPOCA. Section 93 (1) provides:

Section 93.(1) Every person who owns or intends to use detachable SIM card or built-in SIM card mobile telephone shall be obliged to register SIM card or built-in SIM card mobile telephone.

(2) Any person who sells or, in any other manner provides detachable SIM card or built-in SIM card mobile telephone to any potential subscriber shall-

(a) where the potential subscriber is a natural person, obtain and fill in a form which contains the following information-

(i) the full name of the potential subscriber;

(ii) identity card number or any other document which proves identity of the potential subscriber; and

(iii) residential and business or registered physical address, whichever is applicable;

(b) where the potential subscriber is a legal person, obtain and fill in relevant a form accompanied with a certified copy of-

(i) certificate of registration or incorporation;

(ii) business licence;

(iii) Tax Payer Identification Number Certificates; and

(iv) where applicable, the Value Added Tax.

(c) obtain from the potential subscriber any other information which the person who sells or in any other manner provides the detachable SIM card or built-in SIM card mobile telephone deems necessary. (Italics by Tribunal)

According to RW1's testimony, the appellants being network operators solely had the power to give or deny access to their networks to subscribers who hold unregistered SIM cards. On this evidence that the appellants are in full control of the networks and responsible for the products they offer by the provision of the SIM cards to subscribers by whatever manner be it as dealers, distributors or agents, to network access facilitation, they were clearly in a position to act promptly in order to ensure no unregistered SIM cards were used. The appellants cannot claim not to have known about the use of unregistered SIM cards even if such SIM cards were sold by a third party since it is undisputable that apart from being the

manufacturers of such products and having the control of the networks, they have the responsibility of ensuring that their dealers and distributors transact business in a manner required by the law.

As regards the first part of the second ground of appeal, we affirm the principle of natural justice that no one should be judge in his own cause. The principle ensures impartiality in deciding cases where no person can judge a case in which they have an interest as laid down in **R v. Sussex Justices, ex parte McCarthy case [1924]** 1 KB 256, [1923] All ER 233). The case of **Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1998]** 1 S.C.R. 3 cited by learned counsel for the respondent to support his argument that there is an exception to the above principle in circumstances where there is no impartial person to decide the matter is, in our view, distinguishable and inapplicable in the present case. In the **Reference re Remuneration of Judges case** it was held that under the doctrine of necessity a judge who is not impartial can be allowed to hear the case nonetheless, if there is no impartial judge who can take his place. We are of the opinion that both the principle and the necessity exception do not apply in this appeal due to the fact that the respondent is not a court of law or a judicial organ but purely a quasi-judicial/administrative organ entrusted with the task of regulating the communications sector and enforcing compliance with the TCRA Act as amended by EPOCA. As a regulatory body, the respondent is required to enforce compliance with the law hence the need to investigate

and make appropriate decisions which at best can be quasi-judicial decisions. In the event, we find that there was no violation of the principle of natural justice/bias as was argued by the learned counsel for the appellant.

Similarly, with respect to the second limb of the second ground of appeal, we find that the respondent's order that the appellants should, within a period of seven days, de-activate unregistered SIM cards and submit a report of compliance to the respondent is neither unreasonable nor does it contravene any provision of the law and is in fact legally founded under sections 42(5) and 45 of the TCRA Act as amended and does not infringe the appellants' right to appeal. Besides according to RW1 de-activation of SIM cards is system based and does not require a physical hunt down and tracing of subscribers. The two other orders in the decisions appealed from were orders requiring the appellants to refrain from conduct which is in contravention of the provisions of the TCRA Act and requiring them to take actions in compliance with the law and were accordingly, in our view, nothing but compliance orders within the provisions of section 45(1)(2) and (3) of the TCRA Act. In the premises the orders cannot be termed unreasonable.

As regards the contention that the respondent should have summoned users or owners of the alleged unregistered SIM cards to testify whether they had in fact not registered the SIM cards, needless to say, it is only after the registration process is completed that a user or subscriber may be identified and

his/her whereabouts established. There is no way that the respondent could have summoned an unknown person. More importantly, the appellants have not disputed the fact that the listed numbers were not registered as claimed by the respondent nor did they show any dissatisfaction as regards the time frame provided for registration of all SIM cards. Besides, the numbers that were found not to be registered are evidently not many, the majority of the numbers having already been registered.

We must also disagree with the argument by learned counsel for the appellants regarding the lack of verifiable identities from users of the mobile phones. The law clearly requires verification before filling in the registration forms. Section 93 (3) of EPOCA reads:

> Section 93*(3)- Subject to the provision of sub-section (2), the application service licensee, operator or the distributor, agent, dealer authorised to sell or provide the detachable SIM card and, or built-in SIM card mobile telephone by the respective application service licensee or operator shall, before filling in the form, verify all the information obtained.*

The claim that there are no verifiable identities from various users indicates that the appellants, despite being in a position to disable the unregistered SIM cards for reasons of lack of identities, have knowingly opted to continue providing its services to such subscribers even though in so doing they had

contravened the law. Moreover, as pointed out by learned counsel for the respondent, if the electronic information could not have been completed within the timeframe provided due to whatever reason, the appellants ought to have requested extension of time.

Lastly, the complaint (ground three) that the respondent had refused to acknowledge the challenges faced by the appellants in the registration exercise that make it impossible to attain one hundred percent SIM cards registration is clearly unfounded and, in our view, is an afterthought. As stated herein, in their submissions before the respondent, the appellants had admitted that they had managed to register a majority of the SIM cards despite the challenges claimed. This being the case, if time was a constraint in completing the exercise they ought to have sought extension of time.

In the upshot it is our view that even though the notices/summonses directing the appellants to appear before the respondent were erroneously titled "Compliance Orders" the appellants were not prejudiced in any manner. They were clearly lawfully directed to appear before the respondent under section 17 of the TCRA Act. The respondent, as stated above, as a regulator has powers under section 17 to call any person in order to obtain information, evidence and documents that may assist the respondent in the performance of its functions and in order to satisfy itself about any matter relevant to its functions. Under section 17 read together with section 45 of

the TCRA Act the respondent has the option to issue a compliance order or to require the appellants or any person by summons, as it did in the instant case, to appear before it to give evidence and supply information. The decisions which followed the hearing and investigation are in fact the compliance orders.

In the circumstances we are satisfied that the two appellants had full knowledge that there were unregistered mobile phone users in the market and yet had allowed them to continue to use the phones or SIM cards and thereby caused to be used an unregistered SIM cards contrary to section 131 of EPOCA.

In the event the consolidated appeal being devoid of any merit is hereby dismissed with costs.

Dated this 30th day of November, 2012.

Judge R. H. Sheikh – Chairman

Prof. J.M.L. Kironde – Member

Mrs. P. Kasonda – Member

Judgement delivered this 30/11/2012 in the presence of the above.

Judge R. H. Sheikh – Chairman

Prof. J.M.L. Kironde – Member

Mrs. P. Kasonda – Member