

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 7 March 2018

Case Number: 239/2017

IN RE: 45 DEGREES HOLDINGS (Pty) Ltd

PANEL: Prof JCW van Rooyen SC
Cllr Dr Keabetswe Modimoeng
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

From the Coordinator's Office: Ms Meera Lalla (Attorney).
CCC Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

INTRODUCTION

[1] This is a matter which was referred by the Compliance Division of ICASA in terms of section 17C of the ICASA Act 2000 (as amended in 2005) to the Complaints and Compliance Committee ("CCC") at ICASA. The Respondent is 45 Degrees Holdings (Pty) Ltd, which was issued with an Individual Electronic Communications Service Licence effective from 16 January 2009, signed by the Chairperson of ICASA at the time, Mr Paris Mashile. The

¹ An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) in terms of the ICASA Act 13 of 2000 and section 33 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers an order in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator. Decisions of the CCC where no order is advised to Council, are also referred to Council.

matter was part of a substantial backlog of matters referred to the CCC in 2013 by the Compliance Division of ICASA. In some instances, alleged contraventions dated back to the financial year 2005-2006. At the core of the references was the contraventions of Regulations, which require financial statements to be filed, fees to be paid and reports of not having become active in terms of the ECS and ECNS licences.

[2] In accordance with section 17B(a) of the ICASA Act, the CCC *must* investigate, and hear if appropriate, *and* make a finding on all matters referred to it by the Authority. In some instances, licensees had addressed the omissions before the hearing of the matter and it was, according to Compliance, not necessary for the CCC to issue more than a desist order. In such cases, the licensee was advised by the Coordinator that it was not necessary to appear before the CCC if it accepted a desist order. In the normal course, the matter was then dealt with by the CCC at a meeting when other matters were, in any case, before the CCC. A desist order is enforceable in terms of section 17H(f) of the ICASA Act. It has the effect of an interdict which, if contravened in future, could lead to a charge being laid before a Court.

CHARGE

[3]The allegation was that 45 Degrees (Pty) Ltd had not filed financial statements for the years 2006-2007, 2011-12 and 2012-2013. Notices had been published in *Government Gazettes* which informed licensees to file financial statements within six months after the end of a financial year.² There was also a letter from the Manager Compliance sent to licensees, dated 27 March 2013, that they must file financial statements and also submit other information as required. Furthermore, the charge was also that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) for the relevant years. Also that no licence fees were paid, where applicable, in terms of the ICASA General Licence Fees Regulations.³ A letter was also sent by the Coordinator’s Office to Mr Bruce Croza, the 100% shareholder of the company, at the address provided

² Regulation 9 of the Standard terms and Conditions for Electronic Communications Systems 2010.

³ The latter is only applicable where the turnover is beyond a prescribed amount.

on the licence, dated 3 October 2017. It called upon him to respond to the charges within fifteen days of receipt thereof.

THE LIMITATION OF THE CHARGE SHEET

[4] Since the present matter was referred to the CCC in July 2013 as part of a substantial backlog of alleged contraventions by numerous licensees, it mostly did not include financial years later than 2011-2012. In some cases the reference has, however, included the year 2012-2013, as in the present matter. The CCC is not permitted in law to add later financial years to the reference. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another*.⁴ In this matter a charge was added to the charge sheet by an official who was not empowered to do so. The charge was set aside by the Supreme Court of Appeal. Judge of Appeal Mhlantla stated as follows:

[29]...In my view, Janzen (however misguided), acting on behalf of the HPCSA, in deciding on and proceeding to add the additional charge, was engaging in administrative action. His decision clearly falls within the definition of "administrative action" and is in the ordinary course subject to review for lack of statutory authority in terms of section 6 of PAJA.

[30] Even if this were not so, the committee and the pro forma complainant exercised public power, purportedly in terms of the provisions of the Act and the regulations. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*, the following was said in paragraph [40]:

"It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be reviewed by the Courts. The exercise of such powers, like the exercise of the powers of all other organs of State, is subject to constitutional review which . . . includes review for 'legality' . . ."

[31] The principle of legality is implicit in our Constitution and applies to every exercise of public power, thus providing an essential safeguard even when action does not qualify as "administrative action" for purposes of PAJA or the Constitution. As stated by Sachs J in *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amicus curiae)*:

"The constitutional principle of legality is of application even when the action in question is an exercise of public power that does not qualify as 'administrative action' . . ."

The principle of legality requires that "power should have a source in law" and "is

⁴ [2012] 1 All South Africa Law Reports 49 (SCA).

applicable whenever public power is exercised. Public power . . . can be validly exercised only if it is clearly sourced in law".

[32] The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not "sourced in law" and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside. The inquiry, if it continues, can relate only to the multiple relationships charge. (Footnotes omitted)

It is true that the CCC has an investigative function in terms of section 17B of the ICASA Act, but that does not mean that it may add a charge to the charge sheet during that investigation. It may, in any case, only exercise the investigative function within the rules of fairness, according to the Constitutional Court.⁵ Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court of Appeal, cited above.

[5] The September 2010 Regulations, made operational in September 2011, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect and, accordingly, the earlier than 2011-12 financial statements are not permitted in law to be part of the charge-sheet before the CCC. The earlier Regulations were substituted by the September 2010 Regulations, as referred to above. The Constitution of the Republic of South Africa⁶ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁷

[6] Thus, only the omission to file a financial statement for the years ending February 2012 and 2013 are before the CCC. That does not mean that the debt to pay USAF fees and licence fees has fallen away.⁸ It only means that in *this*

⁵ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at para [44].

⁶ See section 35(3) (l). Cf. *Masiya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoi v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁷ And it is constitutionally acceptable. Thus, the death penalty could not be imposed for murder committed even before the interim Constitution of the Republic became effective in April 1994.

⁸ Claims are, of course, subject to prescription, which is probably, depending on argument in this regard, three years in this case. See *Maize Board v Epol (Pty) Ltd* 2009 (3) SA 110 (D); *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA); *Commissioner of Customs*

process - which could lead to the imposition of, for example, a fine - only two financial years and duties to pay fees for those years are before the CCC.

FINANCIAL STATEMENTS

[7] According to a notice to the CCC by Compliance, the Respondent had, by 7 November 2017, as a result of the filing of this matter before the CCC and the correspondence by the CCC Coordinator's Office to it, fully complied.

CONTRAVENTION BY THE LICENSEE

[8] The question, however, remains what order should be advised to Council in terms of the ICASA Act, since the Respondent has, despite its ultimate compliance, contravened the Regulations.

A high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*⁹ Judge Didcott held that "ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*" To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice for a finding against a licensee. Compare *S v Longdistance Natal Pty Ltd*¹⁰ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*"Mens rea*¹¹ in the form of *culpa*¹² is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder.

and Excise v Tayob and Others 2002 (6) SA 86 (T); *The Master v IL Back & Co Ltd and Others* 1983 (1) SA 986 (A).

⁹ 1986(4) SA 1135(N); the Standard Terms and Conditions for Individual Electronic Communications as well as Network Services licences 2010 both came into operation on 11 September 2011.

¹⁰ 1990 (2) SA 277 (A).

¹¹ Translated: "a guilty mind".

¹² Translated: negligence.

It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

[9] According to the Appellate Division of the High Court, finding support in the published articles of South African legal writers, ignorance of the law could be a complete defence.¹³ Thus, in *S v De Blom* 1977(3) SA 513(A), Chief Justice Rumpff stated as follows (translated):

Although *mens rea* is not expressly required in regulation 22 of the Exchange Control Regulations in Government Notice R1111, it appears to be clear, if the nature, purpose and scope of the regulations are considered, that the presumption that the State President did not wish to make an innocent illegal act or omission punishable in terms of the regulations cannot be rebutted. In such a case it must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when *culpa* only, and not *dolus* alone, is required as *mens rea*, there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money out (of the country). Should there be, on the evidence as a whole, i.e. including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have *mens rea*, in the sense described above, the State would not have proved its case beyond a reasonable doubt.¹⁴

[10] Returning to the facts of the present case. Although there is no reason to doubt the *bona fides* of the licensee there was, nevertheless, a contravention in that the licensee should have taken legal advice as to its duties in terms of the relevant legislation or simply have read the Government Gazette Notices, which were also copied on the website of ICASA. The licensee's ignorance of the law was not, as set out by the then Chief Justice in *De Blom*, excusable. There was, accordingly, a negligent contravention of the Regulations, in accordance with which the *Government Gazette* notice was published.

[11] The alleged omissions before the financial years 2011-2012 and 2012- 2013 fall within the period when the repealed regulations applied. These Regulations were repealed in September 2011.¹⁵ In so far as the earlier financial years are

¹³ However, see Snyman *Criminal Law* (2002) 185.

¹⁴ *Dolus* = intention; *culpa* = negligence; *mens rea* = a guilty mind.

¹⁵ USAF = February 2011 and the other two, September 2012.

concerned, the CCC is not constitutionally empowered to hear the matter, as pointed out above.

[12] Insofar the years 2011-2012 and 2012-2013 are concerned the Respondent has now filed the statements and paid the dues. Statements after 2012-2013 were not included in the reference to the CCC, since the reference to the CCC was made in 2013 as part of the backlog.

[13] After the Respondent was made aware of its omissions, it has, according to documentation before the CCC from Compliance, fulfilled its financial obligations for the years as charged. Audited Confirmation of payments made for earlier years was also filed.

[14] The fact, however, remains that it had not complied and a finding against the licensee must be made. Given the willingness of the Licensee to comply after the CCC notice of this matter to it and its compliance for the years as charged, it is not necessary to advise Council to impose more than a so-called desist order.

ADVICE TO COUNCIL OF ICASA

That Council notes the contravention and the fact that the licensee has in the light of the process of the Coordinator's Office addressed the omissions as charged fully.

That since there are no aggravating factors, Council, in terms of section 17E(2)(a) of the ICASA Act, issues the following order:

That 45 Degrees Consulting (Pty) Ltd is directed to desist in future from not complying with its duty to file its audited (or otherwise, confirmed under oath by an Accountant) financial statements timeously, pay its contribution to the Universal Service and Access Fund and, where applicable, licence fees.



JCW VAN ROOYEN SC

21 May 2018

CHAIRPERSON OF THE CCC

The CCC Members agreed with the finding and the order advised to the Council of ICASA.

