

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 10 February 2017

Case number 170/2016

IN RE: ALAZON CONNEXION (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Clr Nomvuyiso Batyi
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Nomfundo Maseti
Ms Mapato Ramokgopa

From Compliance (ECS and ECNS): Ms G Shabangu

From the Coordinator's Office: Attorney Meera Lalla

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 15th January 2009 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service

¹ An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to 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 whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law. The order of Council is enforceable in terms of section 17H (1)(f) of the ICASA Act.

Licence and an Individual Electronic Communications Network Licence to Alazon Connexion (Pty) Ltd (“ALAZON”). The present name of the company is Sikhulise Alazon Connexion (Pty) Ltd.

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013 to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that Alazon had not filed financial statements since it was issued with the licences in 2009. There was also a letter to Alazon from Mr Moulana, the Manager of ECS/ECNS Licences at ICASA, dated 4 April 2013, requiring Alazon to inform the Division whether it was active under the licences and, if not, to provide reasons why it was not active. The letter gave Alazon 7 days to answer. No answer was filed.

[3]The matter was set down for a hearing before the CCC on 24 November 2016. On 24 November 2016, when the case was called, attorney Malapane, appeared before the CCC and applied for a postponement since, having been instructed at a late stage, he had not had time to study the details of the matter. The matter was then postponed to 10 February 2017. The Coordinator was then informed that Mr Malapane had withdrawn from the matter. No representative from the licensee turned up at the hearing.

[4] It was noted that on 8 September 2016 Compliance and Consumer Affairs at ICASA had granted Alazon extensions of 12 and 24 months to become operational in respect of the two licences.

MERITS OF THE CHARGE

[5] It should be pointed out that only the charge for 2011-2012 financial year was valid. This is so since the September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect. Financial years before 2011-2012 cannot be part of the alleged contraventions before the CCC, since the earlier Regulations were repealed by the February² and September 2011³ Regulations.

² The ICASA USAF Regulations (Feb) 2011.

³ Two sets of ICASA Regulations published (Sept) 2011.

The Constitution of the Republic of South Africa 1996⁴ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁵ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Alazon. Thus, only the omission to file the financial statement for the year 2011-2012 was before the CCC. The same principle applies to the USAF contributions and licence fees. Since it is not disputed that Alazon was not active in terms of its licences for the said year – and has, in fact not been active under its licences at the time of the hearing of this matter – it had no duty to file financial statements. The charge concerning the non-filing of the 2011-2012 financial statement is, accordingly, dismissed.

[6] A last question is, however, whether the licensee should not be held responsible for not having applied for an extension earlier. The answer is in the negative. The above mentioned *Government Gazettes* relating to the years 2011-2012 and 2012-2013 only called upon licensees to file financial statements. No mention was made of a duty to inform ICASA if licensees were not active in terms of their licences. Only the 2013 *Gazette* called upon licensees to inform ICASA if they were not active under their licences. And that was done in a manner which did not appear to be a contravention of the Regulations. The present matter only relates to the omission to file financial statements and not to an omission to apply for an extension. The CCC cannot add to the charges. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA). A finding in this regard is, accordingly, not permissible in law.

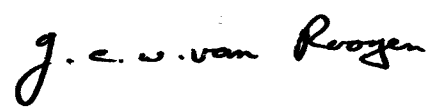
FINDING

[7] The charge against Alazon Connexion (Pty) Ltd for not having filed its financial statements for the year 2011-2012 is not upheld since it was not active in terms of its licences.

⁴ 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].

⁵ 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.

The extension of the period to become operational granted by Compliance on 8 September 2016 is noted.

A handwritten signature in black ink, reading "J.C.W. van Rooijen". The signature is written in a cursive style with a large initial 'J'.

PROF JCW VAN ROOYEN SC

CHAIRPERSON

27 March 2017

The Members of the CCC agreed with the finding.