

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 15 March 2017

CASE NUMBER 227/2016

IN RE: ALL TECHNICAL INVESTIGATIONS AND SECURITY CC (t/a Keylinks)

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

From the Licensee: Mr Samuels; In attendance from the Office of the Coordinator: Mr TP Mtolo; From Compliance Ms C Mhlongo; Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 17 October 2011 All Technical Investigations and Security CC t/a Keylinks (“Keylinks”) was issued with a Class Electronic Communications Service Licence

¹ An Independent Administrative Tribunal at ICASA, which was set up by the ICASA Council 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.

and a Class Electronic Communications Network Service Licence by the Independent Communications Authority of South Africa ("ICASA"). ICASA's Compliance Division (ECS and ECNS licences), which has a delegated monitoring function under the supervision of the Chief Executive Officer of ICASA,² referred this matter on 20 June 2013 to the Complaints and Compliance Committee ("CCC"), alleging that Keylinks had not filed financial statements for the year 2011-2012 and thus also did not pay its USAF contribution and its licence fees.

[2] It surfaced at the hearing of this matter that Keylinks had also not filed financial statements for later years. However, for the Coordinator or the CCC itself to add a charge in the matter before it, would be in conflict with the constitutional principle of legality. 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). In this matter a charge was added to the charge sheet by an official who was not empowered to do so. That 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

² See section 4(3) (b) of the ICASA Act read with section 4(4) (a) (iii) of the same Act.

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 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)

[3] It is true that the CCC has an investigative function, 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 that investigative function within the rules of fairness, according to the Constitutional Court.² Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court of Appeal, as cited above.

FINANCIAL STATEMENTS

[4] The Respondent provided the CCC Coordinator's Office with financial figures for the years 2011-12 and 2012-13. The documents, however, do not accord with what is expected from a licensee. Financial statements confirmed either by an Accountant or an Auditor are required. Mr Samuels apologized for this and indicated that he would be in a position to file proper statements within sixty days.

[5] The ultimate filing and payment does not, however, absolve Keylinks from being found to have been in contravention of the relevant regulation followed by a 2011 *Government Gazette* Notice. The Notice required licensees to file financial statements for the year 2011-2012. A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Wag*

*lines Pty Ltd and Another*³ Judge Didcot 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 Long-distance Natal Pty Ltd*⁴ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Men’s rea*⁵ in the form of *culpa*⁶ 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. 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. (*C S v De Bloom* 1977 (3) SA 513 (A) at 532G.)

[6] Thus, even if it were to be accepted that Keylinks did not act with intention in not filing financial statements and paying its USAF contributions, it must nevertheless be found to have been in contravention of the 2011 Regulations for not having filed its 2011-2012 financial statement and not having paid the amount due for USAF fees in that year. Annual Licence fees were not payable as a result of Keylinks not having had a turnover, the size of which placed a duty on it to pay a licence fee. As pointed out, the present charge, constitutionally, only relates to the 2011- 2012 financial statement and the 2011-2012 USAF fees. As a licensee Keylinks should at least have obtained legal advice as to its obligations in the light of the judgments referred to above, alternatively, managed its business with a higher degree of dedication to the relevant Regulations.

FINDING ON THE MERITS

[7] The following finding is made:

³ 1986(4) SA 1135(N).

⁴ 1990 (2) SA 277 (A).

⁵ Translated: “a guilty mind”.

⁶ Translated: negligence.

(a) That **ALL TECHNICAL INVESTIGATIONS AND SECURITY CC (t/a Keylinks)** has contravened the 2011 Class Licence Regulations, by not having filed its 2011-2012 financial statement in time.

(b) That it accordingly omitted to contribute to the USAF fund for that year in time.⁷

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

Thus, the CCC's advice to Council is to issue the following order:

1. That **ALL TECHNICAL INVESTIGATIONS AND SECURITY CC (t/a Keylinks)** is directed in terms of section 17E (2) (a) of the ICASA Act to desist in future from not timeously filing its financial statements and paying its USAF contributions and, where applicable, its licence fees.
2. That **ALL TECHNICAL INVESTIGATIONS AND SECURITY CC (t/a Keylinks)** is directed to file its financial statement for the year 2011-2012, appropriately confirmed by an Accountant or an Auditor within sixty calendar days from the date on which this judgment is issued by the Office of the Coordinator.
3. Later financial statements must, of course, also be filed. Since the later years were not included in the charge before the CCC, this obligation is merely mentioned for the information of the licensee. The licensee is advised to urgently discuss the later statements with Compliance (ECS and ECNS) at ICASA – if they have not been filed yet.



20 April 2017

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the recommendation to Council on the sanction.

⁷ Licence fees were not payable.

