

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 16 March 2017

CASE NUMBER 226/2016

IN RE: ALT-X WIRELESS NETWORKS CC

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

CCC Assessor: Mr Thamsanqa P Mtolo

CCC Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND AND CHARGE

[1] On the 8th February 2012 Alt-X Wireless Networks CC (“Alt-X”) was issued with a Class Electronic Communications Network Service Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s

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.

Compliance Division (ECS and ECNS licences), which has a delegated monitoring function under the authority of the Chief Executive Officer of ICASA,² referred this matter on 20 June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that Alt-X had not filed financial statements for the years 2010-2011 and 2011-2012 and thus also did not pay its USAF contribution and its licence fees. Since the first period was obviously not relevant – the licence having been issued in February 2012 - it was left out in the 8 November 2016 letter by the Coordinator to the licensee. The year 2012-13 was, however, added. According to the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA) it is not permissible to add to the initial charges before an Administrative Tribunal, unless, of course, a new reference is received from Compliance. The matter before us is, accordingly, limited to the year 2011-2012. The financial year 2011-2012 does fall within the 2011 Regulations, which, being dated September 2011, replaced the previous regulations as from the financial year 2011-2012.

[2] After correspondence between the Coordinator’s Office and Mr Koornhof, the member of the close corporation, the financial statements for the years 2011-12 and 2012-13 were filed and confirmed by Alt-X’s accountant. The USAF fee was also paid. Ultimately there was, accordingly, compliance.

THE MERITS

[3] The ultimate filing and payment does not, however, absolve Alt-X from being found to have been in contravention of the relevant Regulations 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

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

³ 1986(4) SA 1135(N).

management within the licensing regime, negligence (*culpa*) would generally suffice for a finding against a licensee. Cf. *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.)

[4] Thus, even if it is accepted that Alt-X did not act with intent in not filing the financial statement and not paying Universal Service and Access Fund (“USAF”) fees and had rectified the omission, it must still be found to have been in contravention of the 2011 Regulations. The fact that Alt-X has, at this stage, paid its outstanding fees and filed its 2011-2012 and also the 2012-2013 financial statements is an extenuating circumstance in the consideration of the order which we will consider in our advice to Council.

[5] Alt-X, accordingly, is found to have been in breach of the 2011 Regulations by not having filed its 2011-2012 financial statement and paid its USAF contribution for the year 2011-2012 timeously.

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

[6] In the light of the fact that Alt-X was *bona fide* in its omission to file the 2011-2012 financial statement and pay USAF fees for the year 2011-2012 and has now filed the statement and paid the fees, it is not necessary to issue more than a desist order in terms of section 17E (2) (a) of the ICASA Act. That sub-paragraph provides as follows: The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely –

(a) direct the licensee to desist from any further contravention;

The order by Council should, if it agrees with the advice as to the order, read as follows:

⁴ 1990 (2) SA 277 (A).

⁵ Translated: “a guilty mind”.

⁶ Translated: negligence.

Alt-X Wireless Network CC is ordered to desist in future from not filing its duly confirmed financial statements within six months after its financial year-end and paying its USAF contributions within the time limit set by ICASA.

J. C. W. van Rooyen

1 May 2017

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the advice to Council on the order to be issued.