

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date of Meeting: 3 August 2017

CASE NUMBER 240/2017

**IN RE: ALTONET (PTY) LTD**

**PANEL:** Prof JCW van Rooyen SC  
Councillor Keabetswe Modimoeng  
Mr Peter Hlapolosa  
Mr Mzimkhulu Malunga  
Mr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana

In attendance from the Office of the Coordinator: Ms Meera Lalla (Attorney)

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On the 16<sup>th</sup> January 2009 Altonet (Pty) Ltd (“ Altonet”) was issued with an Individual Electronic Communications Network Service Licence and an Individual

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<sup>1</sup> 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 in terms of section 33 of the Constitution 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.

Electronic Communications Services Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences) referred this matter in 2013 to the Complaints and Compliance Committee (“CCC”) at ICASA. It alleged that Altonet had not filed financial statements for the financial year-ends 2007-2008 and 2008-2009, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid. The matter was part of a substantial back-log referred to the CCC in 2013 and it took much time to work through the backlog and also comply with procedural requirements to which this Committee and its Coordinator are subject. That is why the present matter could only be dealt with by the CCC on the above date, in fact, close to the end of the backlog – a remarkable achievement of the Coordinator and her Office.

### **PROCEDURAL LIMIT TO REFERENCES**

[2] The relevant Regulations, under which the reference was made, are from 2011.<sup>2</sup> In so far as the year-ends before 2011-2012 are concerned, the CCC is not constitutionally empowered to hear the matters. The Constitution of the Republic of South Africa<sup>3</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>4</sup> Later years are not before the CCC, since this reference was made in 2013. The same principle applies to the enforceability of USAF fees and licence fees. Of course, the fact that this procedure as to the said earlier years cannot be instituted before the CCC, does not affect the existence of debts – which is a civil law matter.

[3] According to the 2011 Regulations, ICASA is empowered to call upon licensees to, for example, file financial statements. This was done in relevant Government Gazettes.

[4] According to legal procedure the CCC is bound to the alleged contraventions of the 2013 reference to the CCC and these were limited to the years 2007-2008

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<sup>2</sup> USAF = February 2011 and the other two, September 2012.

<sup>3</sup> 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].

<sup>4</sup> 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.

and 2008-2009. The CCC cannot, in law, add to the alleged contraventions in the 2013 reference by Compliance. 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 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)

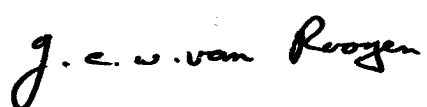
It is true that the CCC has an investigative function, but that does not mean that it may add a charge to the charge sheet during that investigation. It may, in any case, only exercise that investigative function within the rules of fairness, according to the Constitutional Court.<sup>2</sup> Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court of Appeal, cited above.

## **FINDING**

[5] Had the reference from Compliance in 2013 included the years 2011-2012 and 2012-2013 a finding would have been made against Altonet. An advice to Council that it issue an order to desist would then have followed. However, given the omission in the 2013 reference to the CCC to include these financial years, a finding cannot, in law, be made against Altonet. Altonet is, however, cautioned that it should take urgent steps to ensure that it complies with the relevant ICASA Regulations. Its financial statements for 2015-2016 and 2016-2017 are still outstanding. If this matter is not addressed urgently by Altonet, it might find itself before the CCC again.

[6] The result of the process initiated was, however, judged as a whole, of value. It, at least, brought the matter of financial statements and fees under the attention of the licensee – such duty, in any case, also having been advertised by ICASA in annual Government Gazettes.

The matter is thus decided in favour of Altonet.



31 August 2017

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits.

