

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

Date of Hearing: 6 March 2019

Case Number: 302 /2018

**REFERRED BY THE COMPLAINTS AND COMPLIANCE AFFAIRS ICASA**

**RE: AMATOLE TELECOMMUNICATIONS SERVICES (Pty) LTD**

**COMMITTEE** Prof Kobus van Rooyen SC (Chairperson)  
Dr Keabetswe Modimoeng (ICASA Councillor)  
Mr Peter Hlapolosa  
Mr Mzimkhulu Malunga  
Mr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana

Complaints and Compliance Affairs ICASA : Ms K Setshedi

On behalf of Amatole Communications Mr Mark Gray and Ms Anja Makan

From the Coordinator's Office: Ms M Lalla

Coordinator of the CCC: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

[1]The Acting Senior Manager: Compliance and Consumer Affairs ("Compliance") at the Independent Communications Authority of South Africa ("ICASA"), who has a delegated monitoring function in terms of the ICASA Act

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<sup>1</sup> An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it by the Authority 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 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, if any, 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. Such a decision is, on application, subject to review by a Court of Law. Where a complaint is not upheld by the CCC, the finding is also referred to Council.

13 of 2000, as amended, referred a matter concerning Amatole Telecommunications Services (Pty) Ltd (“Amatole”), a licensee in terms of the said Act, to the Complaints and Compliance Committee (“CCC”) at ICASA for adjudication.

[2] Compliance alleged that that Amatole had contravened section 13(1) of the Electronic Communications Act by transferring control of the Company without the required prior permission from the Council of ICASA. Amatole, in its reply to the allegation, accepted that it was in breach of section 13(1) of the Electronic Communications Act 2005 as amended. It also indicated that the transaction in terms of which the control was transferred, would be cancelled. This was confirmed in an affidavit by Mr Gray. However, the CCC must nevertheless decide whether the transaction should not, in any case, be regarded as having amounted to a contravention of section 13(1) of the Electronic Communications Act 2005 as amended in 2014. The mere cancellation of a contract under which a transaction took place cannot, in law, also remove an unlawful act which took place during the subsistence of that contract.

## **THE ISSUE**

[3] Section 13(1) and (2) of the Electronic Communications Act 2005 as amended, provide as follows:

### **13. Transfer of individual licences or change of ownership**

- (1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, **and the control** of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.
- (2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or **transfer control** of an individual licence may be made to the Authority in the prescribed manner. (Accent added)

[4] After the Coordinator of the CCC formally copied the Complaint to Amatole, Mr Mark Gray, who also appeared before the CCC at the hearing, answered as follows:

1. We accept the sanction as recommended by the Compliance Department. In this regard, may I respectfully state once again that I sought direction from the ICASA Compliance Team regarding the change in shareholding by sending the shareholding breakdown and requesting

the forms to be completed. However, based on our actions we should have sought the assistance of a specialist to guide us through the process.

2. We wish to reiterate:

(a) I am the company secretary, and any change in the shareholders Register and the issuing/amendments of share certificates would be done by myself.

(b) Transfer of shares never took place.

(c) We did, however, add an additional 2 Directors to the Board of Directors, namely Ms Sisanda Komna and Dr Ajay Makan. Thereby increasing the Board from 3 to 5 Directors.

Any changes to shareholding was to take place once approval had been granted by ICASA. However, we did add two additional Directors to the Board, as stated above.

The changes in shareholding was to specifically include the Management of Amatole, as well as the children of both the Management and the Directors. There was never an intention to change the control of the company, other than to include the very people who sacrificed much to ensure the turnaround of this USAL.

We look forward to regularising the process under the guidance of ICASA and the CCC

Regards

Mark Gray

[5] The Acting Senior Manager Compliance at ICASA, Ms K Setshedi, set out the case against Amatole and stated as follows in a letter to Mr Gray, dated 26 March 2018:

After consideration of all the relevant factors, [Complaints and Compliance Affairs] has arrived at the conclusion that the transaction concluded amounts to a transfer of control. The Division has reached this conclusion on the basis that Centelx (Pty) Ltd has now acquired control of 51% shareholding and K216436718 has now acquired control of 49% shareholding in Amatole, whereas in the past they did not have control.

## **FINDING**

[6] The CCC has considered the initial licence which was issued to Amatole Telecommunications Services (Pty) Ltd, effective from 15 January 2009. It is clear from this licence that the shares vested in six persons or companies: S Naidoo 36%, Tellumat (Pty) Ltd 25%, M Matibe 24%, A Ntisana 5%, L Komna 5% and M Gray 5%. On 17 November 2016 Mr Gray informed ICASA of the change in shareholding of Amatole. It would, in future, be Centelx (Pty) Ltd and K2016436718 which would be the shareholders. The first for 51% and the second for 49%. A copy of the agreement was also made available to the CCC,

but given the letter by Mr Gray, it is not necessary to deal with the details of the contract. The necessary registration, with amendments, had also taken place with the Commissioner of Companies & Intellectual Property Commission on 21 October 2016.

[7] The CCC is satisfied on the facts before it that the control of the license had been transferred to Centelx in conflict with section 13(1) of the ECA in that the prior written permission of the Authority was not sought in terms of section 13(2) of the ECA. It is, however, noted that after the CCA informed Mr Gray that the transaction had led to a transfer of control, it was undertaken to cancel the transaction. Despite the fact that Mr Gray indicated that the control had not been *transferred*, the documentation before the CCC, judged as a whole, clearly supports a transfer of control and that it had already taken place. A contravention of section 13(1) and (2) had, thus, already taken place. The cancellation of the transfer was, however, noted. The cancellation, however, did not eliminate what had already taken place according to the documentation before the CCC. There *had* been a transfer: in fact clause 1.6 of the contract provides as follows:

“Effective date” means 35 days from date of last signatory, from which all rights and obligations in and to the shares and Sellers’ claims sold in terms hereof shall be deemed to have passed to the purchasers, notwithstanding the date of signature of this Agreement or that any matters requiring implementation have not yet been implemented.””

We are aware of the fact that the contract makes the agreement conditional upon the agreement of a third party. No evidence in this regard was provided in the sense that the contract was not agreed to. Furthermore, Mr Gray, appearing on behalf of the Respondent as a Director, more than once in the correspondence, stated that the contract would be cancelled. Only an existing contract can be cancelled.

The result is, accordingly, that the shares had been transferred and that amounts to a contravention in that the control was thereby transferred. The mere fact that the contract was cancelled does not obliterate the fact that control had been transferred. The transfer which section 13 prohibits, had been

committed. There was a transfer of control and a transfer of control requires prior permission from ICASA.

## COMPLIANCE

[8] A high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*<sup>2</sup> Judge Didcott stated as follows:

“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.

Also compare *S v Longdistance Natal Pty Ltd*<sup>3</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*<sup>4</sup> in the form of *culpa*<sup>5</sup> 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.* (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.) (Accent added)

According to the Appellate Division of the High Court, ignorance of the law could be a complete defence.<sup>6</sup> Thus, in *S v De Blom*<sup>7</sup> Chief Justice Rumpff stated as follows (translated from Afrikaans):

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

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<sup>2</sup> 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.

<sup>3</sup> 1990 (2) SA 277 (A).

<sup>4</sup> Translated: “a guilty mind”.

<sup>5</sup> Translated: negligence.

<sup>6</sup> However, see Snyman *Criminal Law* (2002) 185.

<sup>7</sup> 1977(3) SA 513(A).

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.<sup>8</sup>

[9] Amatole conceded in its reply and at the hearing of the charge before the CCC that it had been mistaken as to the law. It had, accordingly, cancelled the transaction upon receiving the letter from the CCA which called upon Amatole to appear before the CCC as a result of a contravention of section 13(1). Section 13(1) of the Electronic Communications Act 2005 was already amended in 2014 - a substantial period before the new share contract was concluded. Section 13(1) of the ECA is clear: before the *control* of a licensee is transferred the Authority must approve it. Council may even find it necessary to hold hearings in this regard. It is clear from the documentation that the shareholding was transferred before Amatole approached the Authority to record a change in the ownership. This was, however, not a mere change in the ownership – *control* had been transferred.

[10] What now remains to be decided is whether the contravention by Amatole of section 13(1) is culpable. It has often been stated by the CCC that the mere fact that an omission to abide by legislation or a licence condition in terms of legislation is attributable to a licensee is dependent on whether it had intentionally or negligently not abided by such legislation.<sup>9</sup> The matter of ownership and control of a licence is a matter of public interest and to only hold licensees who have acted with intention (which includes the foresight of unlawfulness – so-called *dolo malo* conduct) responsible would go against the clear legislative intention to prohibit the transfer of control in a license issued by ICASA, without *prior* permission by ICASA. Negligence would thus also be sufficient for a finding to be made against a licensee. The legal question is what a reasonable licensee would have done in the same circumstances. It must be accepted that Parliament amended section 13(1) to include instances where a

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<sup>8</sup> *Dolus* = intention; *culpa* = negligence; *mens rea* = a guilty mind

<sup>9</sup> According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention)

licensee resolves to shift the control of a license to a new or existing shareholder or co-owner. Licensing is, indeed, of such importance that the ICASA Act does not permit the Council of ICASA to delegate licensing to e.g. a Councillor or a Committee. It has to take this decision as a Council.<sup>10</sup>

[11]The CCC has come to the conclusion that Amatole has negligently contravened section 13(1) of the ECA and the complaint against it is, accordingly, upheld. Had the contravention required only an intentional act (that is with knowledge of unlawfulness) the defence would probably have succeeded. However, negligence is sufficient for a finding against Amatole.

### **ADVICE TO COUNCIL**

[12] The CCC has found that Amatole has transferred control in the licensee to CENTELX in conflict with section 13(1) and (2) of the ECA and that it had acted negligently by not approaching ICASA for approval of the transfer of control before the control was transferred.

The CCC does not believe that the imposition of a fine is appropriate in the present case. It was, already in the initial correspondence, conceded that an error had been made. In fact, upon receipt of the documentation from ICASA, the transfer was cancelled. The fact is, however, that the cancellation of the contract did not remove the *contravention* – that had already taken place.

Section 17E (2) of the ICASA Act provides as follows

- (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
  - (c) direct the licensee to take such *remedial* or other steps [not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee; (accent added)<sup>11</sup>

[13]The CCC advises the Council of ICASA to consider making the following Order:

1. Find the transfer of 51% shares to Centelx (Pty) Ltd to have been a nullity from the outset.

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<sup>10</sup> See section 4(4)(f) of the ICASA Act.

<sup>11</sup> The “not” which was not included by the Legislature is added to make sense of the provision. This is permissible according to Case Law.

2. Direct Amatole Telecommunications Services (Pty) Ltd to do the following:

(a) Within seven working days from the issue of this order *cancel* the registration, following upon the (unlawful) transfer of control to Centelx (Pty) Ltd, with the Companies and Intellectual Property Commission (“CIPC”), if that has not already been done as a result of the cancellation referred to by Mr Gray in his affidavit.

(b) Copy ICASA with such cancellation and de-registration within seven days from receipt thereof or, if this was already done, within seven days from receipt of this order.

(c) Apply to ICASA for the transfer of control to Centelx (Pty) if Amatole Telecommunications Services (Pty) Ltd again resolves to do so;

(d) Await the resolution of the Council of ICASA in this connection.<sup>12</sup>

Note: The shareholding of K2016436718 remains 49%, since 49% did not amount to transfer of control. Notice must be given to ICASA that the shareholding has been amended so that the licence may be amended on the licence certificate.



Chairperson

29 May 2019

The Members agreed.

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