

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 10 February 2017

CASE NUMBER 167/2017

IN RE: B360 INTERNET SERVICES PROVIDERS CC

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

In attendance from the Office of the Coordinator: Attorney Meera Lalla; from Compliance Ms V Matane; Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 28 May 2010 B360 INTERNET SERVICES CC (“B360”) was issued with a Class Electronic Communications Service Licence and a Class Electronic Communications Network Service Licence by the Independent Communications

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.

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 B360 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.

[2] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect and, accordingly, the 2010-2011 financial statement cannot be part of the contraventions before the CCC. The earlier Regulations were substituted by the September 2011 Regulations. The Constitution of the Republic of South Africa³ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁴ Thus, only the omission to file a financial statement for the year 2011-2012 as well as the omission to pay USAF fees and licence fees are before the CCC.

FINANCIAL STATEMENTS

[3]The correspondence between B360 and the Coordinator’s Office demonstrates poor management on the side of B360 to file financial statements. Ultimately, however, all documentation was filed and fees paid.

[4] The ultimate filing and payment does not, however, absolve B360 from being found to have been in contravention of the relevant regulation followed by a Government 2011 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*⁵ 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

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

³ See section 35(3) (l). Cf. *Masaya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoy v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁴ 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.

⁵ 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

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*⁶ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Men’s rea*⁷ in the form of *culpa*⁸ 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.)

[5] Thus, even if it were to be accepted that B360 did not act with intent 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 B360’s not having had a turnover, the size of which did not place 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 B360 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

[6] The following finding is made:

(a) That B360 Internet Service Providers CC has contravened the 2011 Class licence Regulations, by not having filed its 2011-2012 financial statement timeously; and

⁶ 1990 (2) SA 277 (A).

⁷ Translated: “a guilty mind”.

⁸ Translated: negligence.

(b) That it accordingly omitted to contribute to the USAF fund for that year timeously.⁹

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

[7] The history of this matter, as reflected in email correspondence between the Finance Division of ICASA as well as the Coordinator's Office and the licensee, does not, in the CCC's view, demonstrate an understanding by the licensee that it was seriously in contravention of the relevant regulations. It would seem to regard ICASA as a mere creditor in terms of a contract. In reality, a licence is a privilege granted to a member of society with a concomitant duty to perform in accordance with the law. The representative of the licensee has demonstrated absolute ignorance of a licensee's duties in terms of the Standard Terms and Conditions Regulations 2010 (which were made operational in September 2011) as well as the 2011 Regulations concerning the duty to pay USAF fees. His approach was that ICASA should have sent his firm accounts and that the licensee was not remiss in its obligations in terms of the relevant legislature. Even stating, at a certain stage, that he was "tired" of this process. The duty to file financial statements is a duty which arises as a result of Regulations. ICASA was not remiss in publishing a Notice in the Government Gazette (with a copy on its website) that financial statements must be lodged for the year 2011-2012. The reason for that is that, depending on the turnover, USAF fees must be paid as well as licence fees, when the turnover is above a certain amount.

[8] It is abundantly clear to the Tribunal, judged by the tone of the emails to the Coordinator's Office, that the representative of the licensee was totally unaware that he was dealing with the personnel of a Tribunal, which has a high standing in terms the Constitution of the Republic of South Africa and which could, under certain aggravating circumstances, advise the Council of ICASA to cancel its licences. In spite of promises at the end of 2015 to pay fees, there were problems with this payment and the amount thereof for more than a month. Ultimately, the licensee also did not turn up for the hearing, where its representative would have had the opportunity to take the Tribunal into his confidence. Alternatively a tele-hearing could have been held. But all we have

⁹ Licence fees were not payable.

before us were emails of a nature which is totally unacceptable within the realm of a Tribunal set up in terms of an Act of Parliament.

The Tribunal has decided to demonstrate its discontent with this kind of behaviour by the licensee by advising Council to impose a fine for not complying with its licence conditions.

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

1. B360 INTERNET SERVICE PROVIDERS CC 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
2. B360 INTERNET SERVICES PROVIDERS CC is ordered to pay a fine of R20 000 (twenty thousand rand) to ICASA within sixty working days from the day on which this judgment is issued by the Coordinator of the Complaints and Compliance committee.

The above order is legally enforceable.¹⁰



6 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.

¹⁰ See section 17H (1) (f) of the ICASA Act 2000.

