

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 3 August 2017

CASE NUMBER 247/2017

IN RE: BAUMIE TECHNOLOGIES CC T/A BT BITS

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

From the Respondent: Mr H Baumgarten (Member)

From License Compliance ICASA: Ms Carol Mhlongo

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

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN

[1] On 21 December 2010 Baumie Technologies cc t/a BT Bits (“Baumie”) was issued with a Class Electronic Communications Service Licence by the

¹ 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 of the RSA 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.

Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences) referred this matter in June 2013 to the Complaints and Compliance Committee (“CCC”) at ICASA, alleging that Baumie had not filed financial statements for the years 2010-2011 and 2011-2012 and that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”).

[2] The relevant Regulations, under which the reference was made, are from 2011.² In so far as the year-end before 2011-2012 is concerned, the CCC is not constitutionally empowered to hear the matter. 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 contravention relating to the non-submission of the statement for the 2011-2012 financial year is before the CCC. Later years are not before the CCC, since this reference was made in 2013. The same principle applies to the payment of USAF fees.

[3] According to the 2011 Regulations, ICASA is empowered to call upon licensees to, for example, file financial statements. This was done, insofar as the 2011-2012 financial year is concerned in a December 2011 Government Gazette.

FINDING

[4] Mr Baumgarten from Baumie explained at the hearing of this matter that the close corporation had a difficult year during 2011-2012 and that if there were still matters which should be formalised, he would ensure that these matters would be addressed. He undertook to file a properly completed and confirmed financial statement for the year 2011-2012 and that he would do so within 30 days, which would be 30 working days in terms of the ICASA Act. Ms Mhlongo from Licence Compliance also indicated in a letter to the Coordinator that Mr Baumgarten, on behalf of Baumie, had shown willingness to comply and, on behalf of Licence Compliance, suggested that a desist order against Baumie

² USAF = February 2011 and Class Licence Regulations, operational from September 2011.

³ 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].

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.

would be fitting. The documentation before the CCC also included an audited financial statement for the year 2012-2013. The necessary USAF fees had also been paid.

[5] A high standard of compliance is expected from a licensee and this was, despite the explanation put forward by Mr Baumgarten, 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 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. Cf. *S v Long-distance Natal Pty Ltd*⁶ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Mens 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.)

[6] The conclusion is, accordingly, that Baumie has omitted to file the 2011-2012 financial statement and that it was negligent in not having done so. Mr Baumgarten, however, convinced the CCC at the hearing that the omission in regard to the 2011-2012 financial year would be addressed within 30 working days. His willingness to comply and his explanation of the problematic circumstances during 2011-2012 were taken into consideration in extenuation in determining the order which would be proposed to Council.

⁵ 1986(4) SA 1135(N).

⁶ 1990 (2) SA 277 (A).

⁷ Translated: a guilty mind.

⁸ Translated: negligence.

ORDER ADVISED TO COUNCIL

[7] In the light of the explanation in regard to the 2011-2012 financial year given by Mr Baumgarten at the hearing and his willingness to comply, which is also demonstrated by the compliance for the year 2012-2013, it is not necessary for Council 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;

It is advised that the order of Council states as follows:

That Baumie Technologies cc, trading as BT Bits, is ordered to desist in future from not filing its financial statements, as duly confirmed and paying its USAF contributions, as prescribed.

The undertaking to file the 2011-2012 financial statement within 30 working days is made part of this order.



30 August 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 sanction.

