

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

Date of Hearing: 16 March 2017

CASE NUMBER 216/2016

**IN RE: BROADBAND WIRELESS (Pty) LTD**

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

CCC Assessor in attendance: Adv. Lwazi Myeza

CCC Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND AND CHARGE

[1] On the 25<sup>th</sup> May 2009 Broadband Wireless (Pty) Ltd (“Broadband”) was issued with an Individual Electronic Communications Network Licence and an Individual Electronic Communications Service Licence by the Independent

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<sup>1</sup> 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.

Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function under the authority of the Chief Executive Officer of ICASA,<sup>2</sup> referred this matter on 20 June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that Broadband 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. The referral, in an earlier paragraph referred to years from 2006 to 2012. However, only reference was made to 2010-2011 and 2011-2012 in the “complaint” paragraph. When the matter was referred to the Respondent on 8 November 2016, 2012-13 was added. The Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA) has held that 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 the CCC is, accordingly, limited to the years 2010-2011 and 2011-2012. Only the financial year 2011-2012 falls within the 2011 Regulations which, having been operational from 11 September 2011, replaced the previous regulations as from the financial year 2011-2012.

[2] The Managing Director of Broadband responded to the reference by stating that the company had been purchased in 2014 and that management was totally unaware that earlier statements had not been filed and fees had not been paid. It appeared that the financial manager, who had been retrenched in January 2016, had not left any details on her computer which she had handed in. The Coordinator’s Office, accordingly, granted a thirty days extension for filing as applied for.

[3] It should be mentioned that these facts differ from the case where a licence had been transferred to the new holder – *In Re: EOH Mthombo Technologies (Pty) Ltd* (Case 147/2015). In the latter case it was held that the new licensee could not be held responsible for previous debts of the transferor of the licence. In the present case the licensee remained the same, but the **company** was sold with its assets, which included the licences.

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

## THE MERITS

[4] The ultimate filing and payment does not, however, absolve Broadband 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, to an extent, lacking in the present case. In *S v Wag lines Pty Ltd and Another*<sup>3</sup> 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*<sup>4</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Mens rea*<sup>5</sup> in the form of *culpa*<sup>6</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. (C *S v De Bloom* 1977 (3) SA 513 (A) at 532G.)

In the present matter it can be accepted that the management knew about the regulations, but that they omitted to establish whether the previous management had filed financial statements.

[5] Thus, even if it is accepted that Broadband 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 nevertheless be found to have been in contravention of the 2011 Regulations. It should be mentioned that, given the present facts, the contravention is not regarded as a gross instance of non-compliance: thus, only *culpa levis* is found in contrast to cases

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<sup>3</sup> 1986(4) SA 1135(N).

<sup>4</sup> 1990 (2) SA 277 (A).

<sup>5</sup> Translated: a guilty mind.

<sup>6</sup> Translated: negligence.

where *culpa lata* has been found.<sup>7</sup> The fact that Broadband has, at this stage, paid its outstanding fees and filed financial statements is an extenuating circumstance in the consideration of the order which we will consider in our advice to Council.

[6] Broadband, accordingly, is found to have been in breach of the 2011 Regulations by not having filed its 2011-2012 financial statement and not paid its USAF contribution. It has, however, now filed all its financial statements and paid fees up to the financial year 2015-2016.

#### **ADVICE TO THE ICASA COUNCIL AS TO SANCTION**

[7] In the light of the fact that Broadband was *bona fide* in its omission to file the 2011-2012 financial statement and pay USAF fees for the year and has now even filed later statements 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:**

**Broadband Wireless (Pty) Ltd 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.**



2 May 2017

PROF JCW VAN ROOYEN SC

CHAIRPERSON

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<sup>7</sup> *Culpa levis* = slight negligence; *culpa lata* = gross negligence.

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