

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 15 March 2017

CASE NUMBER 165/2017

IN RE: CP DE WIT

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

For the Respondent: Attorney NL Oosthuizen from James King & Badenhorst (Oudtshoorn); in attendance from the Office of the Coordinator: Attorney Ms Meera Lalla; from Compliance Mr J Tlomatsane; Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 21 February 2011 Christiaan Pieter De Wit from Oudtshoorn 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, set up 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 Mr De Wit had not filed financial statements for the years 2010-2011, 2011-2012, 2012-2013, and thus also had not paid his USAF contribution and licence fees.

[2] The Standard Terms and Conditions For Class Electronic Communications Services 2010 (made operational on 12 September 2011) 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 said September 2010 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 omissions to file financial statements for the years 2011-2012 and 2012- 2013 as well as the omissions to pay USAF fees and licence fees for these years are before the CCC. Licence fees are, according to the relevant regulations, only applicable in cases where the turnover was larger than the prescribed amount.

FINANCIAL STATEMENTS

[3]The correspondence between Mr De Wit and the Coordinator’s Office demonstrates that Mr De Wit was under the impression that he could commence operating under the licences as soon as the licences were issued. That is, indeed, correct. However, one would expect from a business man within this trade (he has been trading in computers, consulting, running an internet café and could not take part in the 2017 CCC hearing per teleconference since he had to attend a seminar by Telkom at Wildernis) to have, at least, taken some trouble to establish whether there were any regulations which govern the use of the licences. The Regulations were followed by Government Gazette Notices

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. *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.

in 2011 and 2012 as to the duties of licensees in regard to the filing of financial statements and were copied on the website of ICASA. The Notices required licensees to file financial statements for the years 2011-2012 and 2012-2013.

[4] A high standard of compliance is expected from a licensee and this was direly lacking in the present case. In *S v Waglines Pty Ltd and Another*⁵ Judge Didcott 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 [the licensee] 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 Longdistance 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. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

[5] Thus, even if it were to be accepted that Mr De Wit did not act with intent in not filing financial statements and paying its USAF contributions, he must nevertheless be found to have been in contravention of the 2010 Regulations for not having filed his 2011-2012 and 2012-2013 financial statements and not having paid the amount due for USAF fees in those years. The licences issued to him explicitly stated that “nothing in this licence shall be construed or understood as to relieve the licensee...of the obligations to comply with any other applicable statutory prohibition or obligation.”

[6] It is true that, Mr De Wit has complied with his duty to file a summary of his income and expenses for the year ending 29 February 2012 – showing a negative

⁵ 1986(4) SA 1135(N).

⁶ 1990 (2) SA 277 (A).

⁷ Translated: “a guilty mind”.

⁸ Translated: negligence.

balance of R56 531. However, the documentation did not amount to what is generally regarded as a financial statement. In fact, his accountants simply stated that no audit was undertaken and that they could not vouch for the correctness of the statement. We have also noted that ICASA invoiced Mr De Wit on 6 March 2017 with R861.12. The Coordinator's Office confirmed that there was an undertaking to file statements by 12 April 2016. A payment of R861.12 was made to ICASA for the years 2011-2012 and 2012-2013. However, in the absence of financial statements confirmed by auditors or accountants the amounts are impossible to check.

[7] Even if we were to accept that Mr De Wit will file what is necessary, his record of compliance is not satisfactory. He has pleaded ignorance, but the CCC is of the view that he did not comply with the high standards which the Courts require from a licensee. We will advise Council to impose a fine. A licensee cannot simply sit back and expect ICASA to keep on reminding him or her of the duties to file financial statements and pay USAF. These duties follow upon the notices in the Government Gazettes and USAF is also payable by law. His attorney has mentioned that Mr De Wit is "perplexed" and could not understand that ICASA was only now taking steps.⁹ In fact, ICASA has taken all the steps which it was obliged by law to take: notices in two Government Gazettes of 2011 and 2012 that financial statements must be filed - with a copy of the notices on the ICASA website. There is no duty on ICASA's Compliance Division to send out further reminders. The financial statements must be filed within six months from year end. There was no duty, additional to the notices in the Government Gazettes of 2011 and 2012, on Compliance to remind Mr De Wit of this duty. In a letter to the CCC Coordinator's Office, dated 25 August 2016, from Mr Teffo from Finance at ICASA, the following is said:

"Mr De Wit has never submitted any Annual Financial Statements for all the years listed ... Finance Division has only received a letter from their lawyers through the CCC Division, only stating the figures claiming to be the USAF contributions for 2012 and 2013 (R861.12), but there is no actual calculations...for 2012 and 2013."

⁹ "Up and until he received the compliance demand our client was completely unaware that he needed to comply, or in what manner he should comply. In fact Mr. De Wit is perplexed that it has taken five and a half years for ICASA to contact him in connection with licensing requirements of which he had no knowledge."

FINDING

The CCC's finding is, accordingly, that Mr De Wit contravened the 2011 Class Licence Regulations by not having filed financial statements for the years 2011-12 and 2012-13 in time. This also led to his not paying his USAF fees in time. We will accept in his favour that licence fees were not payable for those years in the light of his seemingly low annual turnover. If there is an amount owing in this regard, we leave it to Compliance to address.

We will also, for purposes of this judgment, accept that there will be compliance with the duties to file financial statements, which are duly confirmed by an auditor or accountant within 30 days after this judgment is issued.

ORDER ADVISED TO COUNCIL OF ICASA

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

(1) Mr Christiaan Pieter De Wit is directed in terms of section 17E(2)(a) of the ICASA Act 2000 as amended to desist in future from not timeously filing his financial statements in regard to his two licences and paying his USAF contributions.

(2) Mr Christian Pieter De Wit is ordered to pay a fine of R2000 (two thousand Rand) to ICASA on or before 30 June 2017 to ICASA.



23 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.

