COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 15 September 2011 Case number: 52/ 2011

Reference to CCC by Markets & Competition

Ilizwi Telecommunications (Pty) Ltd **Respondent**

Committee

JCW van Rooyen SC (Acting Chairperson)
T Ramuedzisi
J Tlokana
M Ndhlovu[2]

For Markets and Competition

Mr. M. Maake (Numbering Administration Officer) from Markets and Competition, ICASA

For the Respondent

Mr. Steph Deysel (Business Development Director) from Ilizwi Telecommunciations (Pty) Ltd

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FINDINGS

[1] Established in terms of s 17A of the ICASA Act 13 of 2000 as amended ("CCC").
[2] Councillor on the CCC in terms of section 17A(1) of the ICASA Act 13 of 2000 as amended.

JCW van Rooyen

[1] Ilizwi Telecommunications has an IECNS/CECNS licence, which was issued to it by the Independent Communications Authority of South Africa (" ICASA"). It operates from Mthatha, in the Eastern Cape. It, inter alia, has government departments as clients throughout South Africa. It applied for the allocation of numbers to it in September 2010. The numbers were geographically related. This means that the numbers may only be allocated to persons in specific geographic areas (e.g. for Cape Town it would be 021 and Johannesburg 011/010).

[2] Within a week of the allocation of numbers by ICASA to the Respondent a further application was lodged. ICASA required an explanation and it then surfaced that the numbers had been allocated to clients for the purpose of fax-to-email use. This is impermissible according to the Numbering Plan Regulations, which were made in terms of the Telecommunications Act 103 of 1996 on the 15th May 2006. Section 95(1) of the Electronic Communications Act 2005 ("ECA"), which became operational in July 2006, grandfathered these regulations. They have not been repealed in terms of section 95(2) of the ECA.

[3] Regulation 16(3) provides as follows: "The allocation must be used for the purposes specified in the application and within the designated range for use". It is common cause that the numbers allocated were designated for geographic use. According to Regulation 1 "a geographic number means a number from the numbering plan where part of its digit structure contains geographic significance used for routing calls to the physical location of the network termination point of the customer to whom the number has been assigned".

[4] Mr Maake, from Markets and Competitions at ICASA, explained to the CCC at the hearing of this matter that geographic numbers were solely intended for dialling use to the geographic areas specified. When these numbers are allocated to subscribers for use

as a fax address connected to email, the geographic connection is placed at risk. A subscriber living in Bloemfontein might take his or her computer or other e-mail device to Durban. This would, obviously, lead to a disruption of the geographic connection, which would be limited to Bloemfontein.

[5] Mr Deysel, a Director of the Respondent who represented the Respondent at the hearing, informed us that he had misunderstood the Regulations and that the intention was to issue each client with *one* number so as to promote ease of reference to the client in so far as its electronic communications were concerned. He apologised for this mistake and said that he had genuinely believed that the use complained of was permissible. There is no reason why this statement should be disbelieved. The unlawful conduct of the Respondent was, accordingly, not intentional.

[6] The issue before the CCC is whether his mistake as to the applicable law is a full defence to the accusation that the Respondent had contravened the Regulations. The first question is whether the regulation quoted above requires intention to transgress the law, in one of its forms.[3] It should be mentioned that ignorance of the law is a defence in South Africa where an offence is committed for which intention is required and the person involved did not know or foresee the possibility that he or she was in contravention of the law at the time when the offence was committed. However, if negligence is sufficient for the contravention, the test would be whether the reasonable licensee should have known what the law requires of it. There is no reason in law why the same rule should not also be applied in this administrative disciplinary inquiry in terms of the ICASA Act. The said rule is well formulated in *S v Ngwenya* 1979(2) SA 96(A) at 99-100[4] by Jansen JA:

"Waar die teendeel nie blyk nie, sal skuld dus 'n vereiste wees. In die gewone geval sal die verskyningsvorm hiervan wat die Wetgewer in gedagte het, opset (*dolus*) wees en nie nalatigheid (culpa) nie. (As uitsondering kan die bedoeling egter wees dat selfs culpa tov sekere aspekte voldoende kan wees. Vgl, bv, *S v Oberholzer* 1971 (4) SA 602 (A) te 611F - 612C.) Waar opset 'n vereiste is, moet die opset in die reël op al die elemente van

[3] *Dolus directus, indirectus or eventualis* – see Snyman *Criminal Law*(2002)180 *et seq.*
[4] Also compare *Attorney-General, Natal v Ndlovu* 1988(1) SA 905(A); Hugo 1974 *THR-HR* 48 and 295).

die misdaad betrekking hê en, omdat opset in ons reg nie kleurloos is nie, moet daar ook wederregtelikheidsbewussyn wees (*S v De Blom* 1977 (3) SA 513 (A) te 529H ev). Aangesien die bewyslas in die algemeen op die Staat rus om al die elemente van die misdaad te bewys, moet die Staat dan ook hier die opset - met die komponent van wederregtelikheidsbewussyn - bewys (*De Blom*- saak supra te 532E - H). Ooreenkomstig hierdie beginsels is dit duidelik dat die oortredings deur die onderhawige arts 2 en 3 geskep, nie skuldloos kan wees nie en dat *dolus* een van die elemente sou wees wat die Staat moet bewys."

[7] According to the above judgment, the first rule is that intention would be required. This would include knowledge of unlawfulness. We are, however, of the view that given the national importance of numbering and the disruptive effect which contraventions of the regulations could have nationally and internationally, negligence (*culpa*) would be sufficient for a finding of a contravention. As a licensee the Respondent should ensure that it is well informed as to the Regulations which are applicable to its trade. Where it is uncertain as to the legal position, it should obtain legal opinion. We have, accordingly, come to the conclusion that the Respondent, through its director, was negligent as to the legal position and that it was in contravention of the Numbering Regulations by using the allocated numbers outside their geographical aim.

Sanction

[8] When a finding is made against a licensee, the CCC must make recommendations on sanction to the Council of the Authority. The possible sanctions which the Council of ICASA may impose are the following according to section 17E(2) of the ICASA Act:

> (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
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> (a) direct the licensee to desist from any further contravention;
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> (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
>
> (c) direct the licensee to take such remedial or other steps [not][5] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;
>
> (d) where the licensee has repeatedly been found guilty of material violations -

[5] That a printing error may be corrected has been held to be permissible in *S v Mpofu* 1979(2) SA 255(R) at 257 and *In re Duma* 1983(4) SA 469(N) at 479.

(i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or

(ii) amend or revoke his or her licence; and

(e) direct the licensee to comply with any settlement.

[9] Mr Deysel informed us that once it was clear that the Respondent had erred, the Respondent withdrew all the numbers allocated in this fashion. All the subscribers were informed of the error. Mr Deysel undertook to provide us with an affidavit to confirm this. The affidavit was received and is to the satisfaction of the CCC. It is, accordingly, not necessary for the CCC to recommend to Council that it orders the Respondent to withdraw the numbers.[6]

[10] The imposition of a fine would have been an ideal sanction to impose. However, the ICASA Council may only impose a fine where it is *prescribed*[7] by either an Act or Regulations. Since section 17H of the ICASA Act, which, inter alia, sets out a number of fines relates only to offences which are brought before the Criminal Courts, the fines mentioned in that section would not be applicable to the present matter. The present matter is an administrative disciplinary process and does not amount to a prosecution in terms of criminal law before a Court of Law. The Numbering Plan Regulations do not include a fine. Accordingly, the recommendation of a fine is not possible. Two possible sanctions are left.

(1) to order the Respondent to effect remedial steps which are not in conflict with the Act or the underlying statutes. As mentioned above, those steps have already been taken when the Respondent called in the numbers.

(2) since this contravention is the Respondent's first contravention, the only sanction which is left, is an order to desist from similar conduct in future. Such an order is in the

[6] It should be mentioned that the Regulations provide for a time period to be granted so that a withdrawal would not be prejudicial to clients – see Regulation 17.

[7] See section 17E (2)(b) of the ICASA Act.

nature of an interdict and if it is not abided by in future, the Respondent will commit an offence in terms of section 17H of the ICASA Act and be prosecuted before the Criminal Courts for this offence.

Recommendation to Council

1. The Respondent is ordered to desist in future from the conduct of which it was found to have been in contravention: namely, the issue of numbers, allocated to it by ICASA, outside the geographical limits set by the allocation of the numbers, by having allocated the numbers also for fax to email.

2. That the Respondent be cautioned that if it were not to desist from such conduct in future, it would commit a criminal offence for which it would be prosecuted in terms of section 17H of the ICASA Act.

JCW van Rooyen **22 September 2011**

Members Ramuedzisi, Tlokana and Councillor Ndhlovu concurred with the above judgment.