

ANNEXURE 2

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearings: 29-01-2009
16-07-2009

Case number: 25 / 2008

In the matter between

ENGINEERING AND TECHNOLOGY

COMPLAINANT

DIVISION OF ICASA

AND

INTERNET SOLUTIONS (PTY) (LTD)

RESPONDENT

Complaints and Compliance Committee Panel

R. Mokgoatlheng	(Chairperson)
S. Thakur	(CCC Member)
N. Ntanjana	(CCC Member)
T. Matshoba	(CCC Member)
J.C.W. Van Rooyen	(Councillor)

For the Complainant

Adv. Terry Motau - Legal Counsel - ICASA
Mr. Leslie Mkhabela - Legal Counsel for the Complainant
Assisted by Ms. F Naidu

For the Respondent

Siyabonga Madyibi – Responsible for regulatory affairs
Mr. Mark Furman-Manager: Legal.

¹ In terms of s 17C of the ICASA Act 13 of 2000 as amended

SUMMARY

Licensee using equipment which was not type approved in terms of section 35 of the ECA. Licensee reaching settlement with Complainant Division of ICASA that it pays a fine of R20 000. CCC holding that since the sanctions which the ICASA Act provide for only provide that Council may order a Licensee to desist or take remedial steps and no fine is provided for by way of regulation, the settlement of R20 000 in fact amounts to a more severe sanction than Council would have been empowered to impose. However, it is not for ICASA to question the settlement of R20 000, since the settlement does not amount to an illegal contract as a result of its being *contra bonos mores* or, expressed in present day terms, as being in conflict with the basic tenets of the Constitution of the Republic.

Recommendation: That Council orders the settlement to be complied with by the licensee within 30 days of this order by Council.

Judgment

JCW van Rooyen

[1] Internet Solutions (“IS”) is a licensee in terms of the Electronic Communications Act No. 36 of 2005 (“ECA”). The Engineering Division of ICASA lodged a complaint with the CCC alleging that IS had breached section 35(1) of the ECA in that it had used radio apparatus without such equipment having been type approved by the Authority. At the hearing of the matter both parties indicated that they were attempting to reach an agreement as to what penalty should be imposed. This proceeding, it was stated, would be in the nature of a plea bargain and would have to be approved by the Complaints and Compliance Committee. The CCC ruled that the settlement could not relate to whether a contravention had taken place as the relevant facts had first to be set out. The contravention, accordingly, had to be conceded by IS. A postponement was granted and on the 16th July 2009 the settlement was placed before the CCC for its approval and recommendation to the Council of the ICASA. The settlement is attached to this judgment.

[2] It speaks for itself that where a valid complaint was laid, a settlement can only be approved by the CCC, in so far as the merits are concerned. The complaint related to section 35(1) of the ECA and it was conceded that the apparatus had not been type approved. The question then arose whether a fine could have been imposed if the settlement had not been reached and, accordingly, whether a settlement could include a fine if no fine existed for the contravention. Mr. *Mkhabela*, who appeared for the complainant, then added section 32(1) of the ECA to the complaint. Section 32(1) relates to the possession of radio apparatus without a radio frequency spectrum license.

[3] It should be stated at the outset that criminal offences have two components: a prohibition plus a sanction, such as is to be found in section 17H of the ICASA Act no. 13 of 2000. Furthermore, a criminal offence may only be prosecuted before a Court of Law. Except for section 74, which relates to contraventions of license conditions, the ECA creates no criminal offences. It does, however, create what may be termed administrative offences, which are adjudicated upon by the Complaints and Compliance Committee, which is set up in terms of section 17A of the ICASA Act. Section 17E(2) sets out a number of sanctions, which may be recommended by the CCC to the Council of ICASA. It may also recommend a fine, if such fine has been prescribed by the ICASA in a Regulation.

[4] The ICASA may, however, also create offences by way of Regulations. This power is granted to the ICASA Council in section 4(1) of the ECA. Regulations may, according to the said sub-section, only be made where an Act empowers ICASA to make a regulation and, furthermore, where it relates to technical requirements and procedure.² The ICASA Act, however, goes wider in section 4(3)(j), which provides as follows: *“The Authority may make regulations on any matter consistent with the objects of this Act and the underlying statutes or that are incidental or necessary for the performance of the functions of the Authority.”* This would include the authority to create a criminal offence if that is the only manner in which the effectiveness of the prohibitions created could be ensured. In so far as *licensees* are concerned, the prohibitions must, however, be addressed by way of administrative contraventions that will be enforced by the CCC.

[5] Getting back to the facts of the case before us, it is clear that the Regulations in respect of license exemptions in terms of section 4 of the ECA read with section 31(6)(b) in respect of

²(1) The Authority may make regulations with regard to any matter which in terms of this Act or the related legislation must or may be prescribed, governed or determined by regulation. Without derogating from the generality of this subsection, the Authority may make regulations with regard to—

- (a) any technical matter necessary or expedient for the regulation of the services identified in Chapter 3;
- (b) any matter of procedure or form which may be necessary or expedient to prescribe for the purposes of this Act or the related legislation;
- (c) the payment to the Authority of charges and fees in respect of—
 - (i) the supply by the Authority of facilities for the inspection, examination or copying of material under the control of the Authority;
 - (ii) the transcription of material from one medium to another;
 - (iii) the supply of copies, transcripts and reproductions in whatsoever form and the certification of copies;
 - (iv) the granting of licences in terms of this Act or the related legislation;
 - (v) applications for and the grant, amendment, renewal, transfer or disposal of licences or any interest in a licence in terms of this Act or the related legislation; and
- (d) generally, the control of the radio frequency spectrum, radio activities and the use of radio apparatus.

(2) Different regulations may be made in respect of different—

- (a) licences granted in terms of this Act; and
- (b) uses of radio frequency spectrum.

(3) Any regulation made by the Authority in terms of subsection (1) may declare a contravention of that regulation to be an offence, provided that any such regulation must specify the penalty that may be imposed in respect of such contravention taking into account section 17H of the ICASA Act. (emphasis added)

radio frequency spectrum, ECS³ and/or ECNS, which were handed up to us at the hearing, relate to persons who are exempted from having a license, but who nevertheless have to abide by certain duties, inter alia, to have certain equipment type approved by ICASA. If this is not done, the CCC may recommend a maximum fine of R20 000 to Council.

[6] When it became clear during argument that the said Regulations were not applicable to IS, since it is not exempted as intended in the Regulations, Mr. *Mkhabela* applied to add section 32(1) of the ECA to the charge. Section 32(1) prohibits any person to be in possession of radio apparatus if such a person is not in possession of a radio frequency license. However, in so far as the section of spectrum in which IS was using the radio apparatus is concerned, a person is not required to have a frequency spectrum license. It was, accordingly, not correct to have added section 32(1) to the charge since section 32(1) only relates to persons who are in possession of a radio apparatus without a spectrum license, as required. Ultimately, the contravention was that the apparatus used was not type approved and nothing else.

[7] When a licensee is in contravention of section 35 of the ECA by using the equipment referred to in that section, it is subject solely to the jurisdiction of the CCC for not having complied with a duty in terms of the ECA. Since no fine has been prescribed, the only sanctions that may be invoked, in terms of the ICASA Act, are that IS must desist from such action or take remedial steps, which are not in conflict with the Act or the underlying statutes. Only when the CCC has repeatedly found the licensee guilty, may its licence be suspended or its license revoked by Council. The latter sanctions are, of course, not applicable to IS. Had IS and the Complaints Division of ICASA not come to a settlement on the matter, the CCC's recommendation to Council would have been limited to ordering IS to desist. "Other remedial steps" could also have been ordered – in this case, that the equipment must be type approved by ICASA before further use.

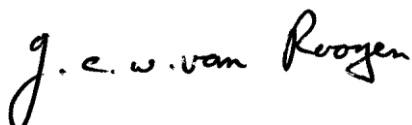
[8] The settlement has placed the matter in a category, which would accord with a situation where a fine had been prescribed. The dilemma now is that the settlement is more onerous than what the orders would have been. We have considered this aspect and have come to the conclusion that it is not for the CCC to inquire into the motives why a settlement was regarded to be more appropriate for IS. The fact of the matter is that a settlement was reached voluntarily and therefore it could not be regarded as illegal as a result of its being *contra bonos mores*, or, as stated in constitutional terminology, something that goes against the fundamental precepts of the Constitution of the RSA. Compare what Cameron JA (as he then was) said in his additional judgment in *Brisley v Drotosky* 2002(4) SA 1(SCA):

³ Published under General notice 926 in Government Gazette 31290 of 29 July 2008.

[91] The jurisprudence of this Court has already established that, in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to *achieve is contrary to public policy*.⁴ Public policy in any event nullifies agreements offensive in themselves – a doctrine of very considerable antiquity.⁵ *In its modern guise, 'public policy' is now rooted in our Constitution and the fundamental values it enshrines.* These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.⁶

[9] We, accordingly, recommend that Council directs IS to comply with the settlement as attached within thirty calendar days of its order. Such an order is provided for in section 17E(2)(e) of the ICASA Act.

Mr Justice R. Mokgoathheng (Chairperson), Ms N. Ntanjana, Ms T. Matshoba, and Mr S. Thakur concurred with the above judgment.



JCW Van Rooyen SC

Date: 24-08-2009

⁴ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *de Beer v Keyser and Others* 2002 (1) SA 827 (SCA) para 22.

⁵ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 172, per Innes CJ, who analyses the Roman and Roman-Dutch authorities at 204-205.

⁶ Constitution, sections 1(a) and (b).