

Date of hearing: 10 August 2011

**In the matter referred to the CCC by ICASA Inspector Neepal concerning alleged non-compliance  
by radio dealer Radio Trunk CC**

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**Complaints and Compliance Committee**

JCW van Rooyen SC (Acting Chairperson)  
N Ntanjana  
Z Ntukwana  
J Tlokana  
F Sibanda<sup>1</sup>

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**JUDGMENT**

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**JCW VAN ROOYEN SC**

[1] Mr. Neepal, an inspector in the service of ICASA, referred a matter of non-compliance to the Complaints and Compliance Committee ("CCC") in terms of section 17F(5)(e) of the ICASA Act 13 of 2000, as amended. The inspector based the referral on the allegation that the Respondent, a Radio Dealer, had in 2010 contravened the Electronic Communications Act 36 of 2005("the Act") and the Radio Regulations 1979<sup>2</sup> in the following respects:

1. The Respondent had, in 2010, installed a radio apparatus without ensuring that its client, ADT, had a radio frequency license to use that radio and thereby contravened section 31 of the ECA. He therefore transmitted a signal without having a frequency licence.
2. The Respondent had, in 2010, contravened section 32 of the ECA by possessing radio apparatus without a radio frequency licence having been issued to it for the relevant frequency.
3. The Respondent did not keep a proper record of the installation as is required by the Radio Regulations 1979.

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<sup>1</sup> In terms of s 17C of the ICASA Act 13 of 2000 as amended.

<sup>2</sup> Issued in terms of the Telecommunications Act 103 of 1996 and repealed by the Radio Frequency Spectrum Regulations 2011 on the 31<sup>st</sup> March 2011. The Radio Regulations were grandfathered up to the latter date by section 95(1) of the Electronic Communications Act 2005.

[2] The Radio Regulations 1979 were, by virtue of section 95(1) of the Act, still applicable up to 31 March 2011, when new Radio Frequency Spectrum Regulations were published by ICASA. The conduct complained of took place in 2010 and the 1979 Regulations were, accordingly, applicable.

[3] The Respondent is a Radio Dealer to which Chapter 2 of the 1979 Radio Regulations apply. As a Radio Dealer the Respondent is not an agent of its client but rents its services to that client,<sup>3</sup> in this case ADT, which is a company that provides security services to clients. Direct and circumstantial evidence in regard to his relationship with ADT makes this plain.

[4] According to section 31 of the ECA no person may transmit any signal by radio except in terms of a radio frequency spectrum license granted by the Independent Communications Authority of South Africa ("ICASA") to it. The Respondent did not possess such a licence. The Respondent installed a transmitter in terms of its service contract with ADT. It is clear from the evidence judged as a whole that the Respondent, through Mr. Wattrus, simply did its job of connecting a new transmitter from the stores of ADT. Any transmission thereafter would be by ADT and not by the Respondent. The Respondent is, accordingly, not in contravention of section 31 of the ECA.

[5] In so far as the alleged contravention of section 32 of the Act is concerned, the CCC must be convinced that the Respondent (through Mr. Wattrus) possessed the apparatus without having had frequency licence. It is common cause that he did not have a frequency license. The question is, however, whether he was in "possession". "Possession" may have a limited meaning or an extended meaning;<sup>4</sup> *possessio civilis*, which means holding an object to keep it or dispose of it as if one is an owner; *possessio naturalis* which amounts to not holding an object in the previously mentioned sense, but to look after it (temporarily or otherwise) on behalf of somebody else. The Respondent, as has been pointed out above, is an independent contractor which, in this case, merely installed a transmitter. It is clear that the Respondent's Director, Mr. Wattrus, did not possess in the first sense. He also did not possess in the second sense. He was merely acting as a conduit from ADT in obtaining the transmitter from the ADT stores and installing it. One cannot, within the context of section 32, regard the Respondent as having possessed the transmitter in law. There was, accordingly, also no contravention of clause 32.

[6] As to the charge that the Respondent had not kept a proper record of the installation at the site, Chapter Two of the Radio Regulations 1979 was applicable. The relevant part of Chapter 2 provided as follows:

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<sup>3</sup> A so called-*locatio conductio operis* – see e.g. *Pellow No And Another v Club Refrigeration cc* 2006 (1) SA 230 (SCA); *BK Tooling(Edms) Bpk v Scope Precision Engineering(Edms) Bpk* [1979] 3 All SA 166(A) – which classifies the Respondent not as an employee and not as an agent but an independent operator.

<sup>4</sup> See *S v Brick* 1973 (2) SA 571 (A); *Snyman Criminal Law*(2002) 269 *et seq.*

“A radio apparatus dealer shall, in respect of all types of electronic communication facilities and radio apparatus other than a sound receiver or television set that he has sold, hired out, donated or supplied in any other manner or has repaired **or installed** for any person, keep a register in which the following are recorded:

- (a) Name and address of the person to whom such equipment was sold, hired out, donated or supplied or for whom the repairs or installation was done.
- (b) Date of the transaction by virtue of which such equipment was sold, hired out, donated or supplied or the date on which the repairs or installation were carried out and the nature of such repairs.
- (c) A description of the type and nature of the equipment involved and, in the case of radio apparatus, the serial number as well as the frequency on which it operates, for example, XYZ two-way radio 1358706 on the frequency 83.5000 MHz
- (d) The number or, where applicable, the call sign and the expiry date of the licence issued to the person to whom such radio apparatus was sold, hired out, donated or supplied or for whom the repairs or installation was carried out or the call sign or number and expiry date of the licence, radio apparatus dealer registration certificate or particulars of permit by virtue of which the person to whom the equipment was supplied or for whom the repairs or installation was carried out was exempted from an obligation to be a holder of an appropriate licence for the possession of such apparatus.” (Emphasis added)

The Register shall, in accordance with Chapter Two, be retained by the Radio Dealer for a period of at least 12 months after the date of the transaction, by virtue of which the required records were made,

[7] Mr. Wattrus observed that he thought that the keeping of a register only applied to repairs and sales. In this case it was a mere installation. It is, however, clear from the above Regulations that also an installation requires a record to have been kept by the Respondent. Although the Respondent was *bona fide*, Mr Wattrus should have studied the Regulations with more diligence and, accordingly, the Respondent was negligent and had contravened the Regulations.

**In the result: (1) Respondent is found not to have contravened sections 31 or 32 of the ECA; and (2) Respondent is found to have contravened Chapter 2 of the 1979 Radio Regulations in that he did not keep a record of the installation which is the subject of this referral by Inspector Neepal.**

## **SANCTION**

[8] As to sanction, it is clear that the Respondent did keep a register, but that he *bona fide* believed installations did not fall under the Regulations. A fine might have been an appropriate sanction to have recommended to the ICASA Council. However, no fine is prescribed for this contravention. One cannot simply, as contended by Mr Neepal, read section 17H of the ICASA Act into these Regulations, since the said section deals with offences in criminal laws, which are brought before a Court of Law. Accordingly, the only viable sanction in the

circumstances is that an order to desist be issued by Council. If the Respondent contravenes this order in future, it commits a criminal offence in terms of section 17H of the ICASA Act. Of course, the contravention will also be taken into consideration when a future similar contravention is found to have been committed by the Respondent. This could then lead to a withdrawal of his certificate to act as a radio dealer.

**The CCC's recommendation to Council is that:**

**Council orders the Respondent to desist from in future not keeping a record of installations of equipment as defined in the ECA.**

Note: This duty to keep a record is also required by the present 2011 Regulations.

"A radio apparatus dealer shall, in respect of all types of electronic communication facilities and radio apparatus other than a sound receiver or television set that he has sold, hired out, donated or supplied in any other manner or has repaired or installed for any person, keep a register in which the following are recorded:

- (a) Name and address of the person to whom such equipment was sold, hired out, donated or supplied or for whom the repairs or installation was done.
- (b) Date of the transaction by virtue of which such equipment was sold, hired out, donated or supplied or the date on which the repairs or installation were carried out and the nature of such repairs.
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JCW van Rooyen SC

**Acting Chairperson**

**Members: Ntanjana, Tlokana, Ntukwana and Councillor Sibanda agreed with the judgment of the Acting Chairperson.**