COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of meeting: 1 March 2010 Case number: 29/2010

RE: REFERENCE BY THE COUNCIL OF ICASA TO INQUIRE INTO THE ROLL-OUT AND CONSUMER CARE COMPLIANCE BY THE SOUTH AFRICAN POST OFFICE IN TERMS OF ITS 2000 LICENCE

Complaints and Compliance Committee

IWB De Villiers, Judge (Acting Chairperson)
N Ntanjana (CCC Member)
T. Matshoba (CCC Member)
S. Thakur (CCC Member)
J.C.W. Van Rooyen SC (Councillor)

JUDGMENT

JCW van Rooyen SC

[1] The Council of ICASA resolved in 2008, in terms of section 17B(a)(i) of the ICASA Act 13 of 2000, to refer the issue of compliance by the South African Post Office ("SAPO") with its duties to roll-out a certain number of retail outlets and to provide proper consumer care in terms of its 2000 licence, to this Committee. If it were to find that such non-compliance had occurred, the CCC would recommend a sanction to the Council.

[2] The task of the Committee, in terms of the ICASA Act, is firstly to investigate the matter and then to decide whether it will hear the matter. As was held in its first

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

judgment concerning *Radio Mafisa*[2]*,* the CCC's task is to arrive at a decision on the merits of a matter. This decision is final and not subject to review by the Council of ICASA. Once it has decided that there has been non-compliance by a licensee, it recommends a sanction in terms of the ICASA Act or South African Postal Services Act 1998 ("SAPSA").

[3] So as to understand this matter within it historical context, it should be mentioned that the SAPSA established a Regulator which, within the Department of Communications, inter alia acted as a disciplinary entity in so far as non-compliance by the SAPO and registered postal operators, were concerned. The ICASA Act, which became operational on the 19th July 2006, provides that the ICASA Council, acting upon the recommendation of the CCC as to sanction, would as from that date be the Regulator.

[4] The licence of the SAPO, which was issued by the Minister on 1 April 2000 in terms of the SAPSA, inter alia, provided as follows:

> *9.1. The Licensee shall draw up a sustainable programme for the period ending 30 September 2002 for the delivery point roll-outs and retail outlet roll-outs in the Republic as well as the development of the reserved postal services. Such programme shall provide:*
>
> *9.1.1. an overall strategy, policies for roll-out, regional implementation, how priority will be given to underserviced communities;*
>
> *9.1.2. a plan to convert virtual addresses to street/box addresses. The Licensee shall submit the initial programme to the Regulator for consideration within 30 (thirty) days of the issue date or within such extended period as the Regulator may allow. Regular updates of the programme shall be provided by the Licensee to the Regulator if a material change occurs from the programme submitted.*

[2] Case 1/ 2007

9.2. The Regulator after consultation with the Licensee shall determine the respective priorities between the serviced and underserviced areas and amongst the other serviced areas for delivery point roll-out and retail outlet roll-out for each of the 12 (twelve) month periods commencing from 1 October 2000, 1 October 2001 and 1 October 2002. To the extent that the Licensee wishes to make any submissions in that regard, it shall do so in writing by not later than 31 July prior to the commencement of the relevant period. The Regulator shall publish in the Gazette by 31 August prior to the commencement of the relevant period, new schedules (which shall replace Schedules 2 and 3 of this Licence).

9.3. The Regulator may provide new targets in regard to delivery point roll-outs and retail outlet roll-outs for the period commencing after 30 September 2002.

[5] The licence provides that a fine, within certain parameters, must be paid by the SAPO if it fails to roll out and provide due customer care as set out in the licence.

[6] We need not dwell on how the matter proceeded thereafter. The final determination amounted to a duty upon the SAPO to roll out 638 outlets per year. In November 2006 the Regulator informed the SAPO in a letter that, in the light of external audit studies which had been undertaken, the SAPO had failed to comply and that a fine of R10 000 000 had to be paid within 30 days.

[7] To this letter the SAPO replied, that in order to implement the target of 638 outlets per year, a capital cost of R957 million per year would be required. Furthermore, operational costs of R191 million per year would also have been required. It was therefore recommended that the roll-out be limited to 85 new outlets per year at a capital cost of R128 million. The SAPO also generally pointed out that a grace period of 120 days should have been provided for, as per the licence. This was not granted before the Regulator made the order. Ultimately the SAPO requested the Regulator to waive the penalty. In the light of the conclusion we have

reached, it is not necessary to decide on the merits or demerits of the point of view put forward by the SAPO as to the costs of the roll-out. It is sufficient to say that in addition to *force majeure* (as provided for in the licence) other forms of impossibility, measured against legal principle, will also be a common law defence for SAPO, depending on the facts.

[8] By October 2007 the matter had not yet been resolved. The matter then came before the Council of ICASA. A letter was, thereafter, written to the SAPO in which it was stated that:
"In assessing the situation, the Authority[3] found that SAPO: (1) failed in terms of clause 11.1.2 of the licence to achieve the national targets on an aggregated basis for retail outlet roll-out; and (2) failed in terms of clause 11.1.4 to achieve the quality of standard of customer care. In light of the above, the Authority[4] resolved that the matter should be referred to the Complaints and Compliance Committee (CCC) for adjudication. The CCC will notify you about the date in which the matter will be heard."

[9] In spite of this letter the matter was not brought before the CCC in 2007. In 2009, after further investigation by the relevant division of ICASA, the Council was requested to waive the fine. Of course, such a course was not open to Council. Council could only act on the recommendation of the CCC. Council then, once again, referred the matter to the CCC. A letter was then sent to SAPO by the Chairperson of Council stating that the fine had been "withdrawn" by Council, but that the matter had been referred to the CCC for a determination. As a result of this referral, the CCC on 3 July 2009, undertook an investigation and requested the relevant Division at ICASA and the SAPO to provide it with representations on the roll-out as well as the matter of customer care standards. The letter stated that a report should be filed in regard to the roll out between the years 2000 to 2005. This letter was later amended to read 2005 to 2008.

[3] Since the "Authority", according to the ICASA Act, is the Council, the word "Authority" should be understood, within this context, as referring to the ICASA management division concerned. At that stage *Council* had not yet reached a decision, since it could only have done so on the recommendation of the CCC.
[4] See the previous footnote.

[10] The Licensing Division of ICASA provided us with a legal opinion from Attorneys Bowman Gilfillan, which concluded that the Regulator had: (a) probably not abided by the rules of fair administrative justice by simply imposing the R10 million fine; (b) that the roll-out was never re-determined after 2002; (c) that the external audit entities which had done the research, had done it for a period after the two years had expired and (d) that in any case, the Regulator was no longer the Regulator when the penalty was imposed in November 2006 – the ICASA Act having become operational in July 2006, with the ICASA Council and the CCC then substituting the Regulator. It was submitted that since this decision had not been attacked in the High Court, it still stood as a decision of the Regulator. *Oudekraal Estates (Pty) Ltd vs. City of Cape Town 2004(6) SA 222 (SCA)* at Para [26] was cited as authority. In the *Oudekraal case* it was accepted in principle that the results of an invalid administrative act cannot simply be ignored and necessarily categorized as invalid as well. It would depend on the facts of the particular case whether the result could be ordered to be undone. That a consideration of all the relevant factors is necessary so as to reach a value judgment also appears from *Pepcor Retirement Fund vs. Financial Services Board*[5] where Cloete JA says at para [49]:

"[49] Whether a review should succeed in a matter such as the present will depend on a consideration of the *public interest* in having the decision corrected and other factors, *and in particular, the interests of the person in whose favour a decision has been made.* Ultimately, a value judgment, balancing all the relevant factors, will be required." (emphasis added)

[11] The SAPO, on the other hand, argued that it was surprised by the fact that the letter from ICASA stated that the penalty had been "waived" but, nevertheless, stated that the matter had been referred to the CCC for determination. This was contradictory. Alternatively it was argued that the "Regulator" had not, in November 2006, abided by the procedures as set out in the licence conditions. The decision of the ICASA Council to waive[6] the penalty was, accordingly, "warmly" received by the SAPO. Furthermore, since no fresh investigations had been conducted for the period 2005 to 2008, a conclusion of the matter was premature. The investigations which had been done, related to periods before 2006.

[5] 2003(1) SA 38(SCA).
[6] The word used in the letter was not "waive" but "withdraw".

EVALUATION

[12] At the outset it is clear that the Regulator in terms of the SAPSA 1998 was no longer in function in November 2006. The ICASA Amendment Act had become operational in July 2006 and ICASA had, by operation of law, stepped into the shoes of the Postal Regulator. There is no reason why ICASA is bound, in any manner, by what the "Regulator" decided in November 2006. The decision was void and nothing could arise from that decision: *ex nihilo nihil fit.*[7] Whilst it might have been necessary for the SAPO to have approached a Court to set that decision aside, it is not necessary for the CCC to do so. The decision was clearly invalid since it could only have been taken by the ICASA Council on the recommendation of the CCC. The matter never came before the CCC and, accordingly, it was void *ab initio.* Alternatively, if it is necessary in terms of the *Oudekraal* principle to accept that the "Regulator's" decision was indeed valid until set aside, it was open to the Council of ICASA to, at least, *withdraw* that decision pending an inquiry by the CCC.[8] As successor in terms of the ICASA Amendment Act 2006 to the erstwhile Regulator in terms of the SAPSA, the Council was entitled to withdraw its predecessor's decision pending the outcome of the CCC recommendation on sanction, if any. By stating to SAPO in the letter dated 3 July 2009 that the fine had been withdrawn, Council in effect cancelled an act which was, in any case, void. At this point it should, however, be pointed out that the penalty was not "waived" (as stated by the SAPO in its argument) but "withdrawn", obviously pending the outcome of the recommendation by the CCC to Council, when the matter would be considered afresh. The CCC, after this investigation, could, accordingly, recommend a sanction to Council.

[13] There is, however, another fundamental reason why a fine could not and cannot be imposed. Both the ICASA Act and the SAPSA provide that a fine must be *prescribed* before the Regulator could have imposed it and, now, the CCC may

[7] "Nothing comes from nothing" - a philosophy established by Pandermines of Elea in the 5th Century BC; also see *Veldspun (Pty) Ltd v Amalgamated Clothing and Textile Workers Union of South Africa* 1990(4) SA 98 (SE) at 898.

[8] See *Njongi v MEC, Department of Welfare, Eastern Cape 2008 (4) SA 237 (*CC) at para [56] where Yacoob J held that organs of state are under a constant duty to review their previous decisions. Of course, this would normally not be permissible where third parties had already acted on a decision.

recommend it to Council. In both Acts “prescribe” means, as indicated in the definition section, enacted by way of *regulation*. Although the SAPO licence was published in the *Government Gazette*, it does not amount to *Regulations*. The inclusion of a fine in the *licence* is, accordingly, null and void.

[14] This conclusion on the fine does not mean that the CCC may not impose one of the other sanctions which are provided for in section 80(4) of the SAPSA. But we also need not dwell on this possibility. In so far as the 2000 to 2002 roll-out is concerned it is clear that the 120 day opportunity to rectify the alleged non-compliance was not afforded to SAPO. And this would also apply to all the periods between 2000 and 2008. To have granted that opportunity retroactively in 2009 (when the CCC became seized of the matter) would have been impermissible: the 2000 licence had already been substituted in October 2008 by a new licence (with new roll-out rules and procedures). In any case, how could such a retroactive period of grace ever be put into practice? Even if the roll-out targets were not met and the customer duties not fulfilled *in fact*, there was no contravention *in law* since the pre-conditions for a finding had not been triggered. No new targets were, in any case, set by the then Regulator after 2002.

CONCLUSION

[15] The CCC’s finding is, accordingly, as follows:

(a) The imposition of a fine would be invalid since there is no *prescribed* fine. The fines mentioned in the *Licence* are invalid.

(b) Any attempt at imposing a fine was, in any case, invalid since the “Regulator” who imposed the fine was no longer in office in November 2006.

(c)The only period in regard to which a valid inquiry might have been undertaken was the period 2000-2002. No such inquiry is, however, valid at this stage since no opportunity to rectify within 120 days was granted to SAPO. There is also no evidence that a full hearing was afforded to SAPO by the then Regulator so that, for example, defences such as *force majeure* or impossibility (as a common law defense) could be discussed.

(d)The period 2005 to 2008 contains no valid roll-out targets, since the then Regulator did not determine new targets after 2002. It is clear from the relevant condition in the licence that the roll-out targets expired at the end of September 2002. Even if the roll-out targets remained valid – if a liberal interpretation of the relevant clauses in the licence is applied – then, once again, no 120 day opportunity to rectify was granted. This principle also applies to the customer care duties, where such a grace period was also provided for.

(e) In the result it is held that no hearing is necessary for the following reasons: (i) The pre-conditions[9] to a possible finding by the CCC that the relevant conditions were not met, were not triggered – both as to 2005-2008 and 2000-2005; (ii) the finding by the "Regulator" in 2006 was void *ab initio;*[10] (iii) it is too late to initiate an inquiry now: not only is there a new licence with its own rules, but it is impossible to grant the periods of grace retroactively; and (iv) since no finding on the merits has been reached by the CCC against the SAPO, no recommendation as to sanction is made to Council.

This finding brings all investigations in regard to non-compliance of the said two conditions in terms of the 2000 license to an end.

Acting Chairperson Mr. Justice De Villiers and Commissioners Ntanjana, Thakur and Mashoba concurred in the above judgment after having made several contributions to the text.

J. e. s. van Rooyen

…… 10 March 2010

[9] Absence of the granting of a 120 day grace period to rectify as to any period between 2000 and 2008 and the omission by the then Regulator to, in any case, set new targets after 2002.

[10] The Regulator was no longer in office in November 2006, the rules of fair administrative justice were not abided by and it was legally not possible to have imposed a *fine* since no fine had been *prescribed* by *regulation*, as required in section 80(4) of the SAPSA.