

COMPLAINTS AND COMPLIANCE COMMITTEE

Date of hearing: 10 August 2011

Case number: 50 / 2011

In the matter between:

ICASA Inspector Rishi Neepal

Complainant

and

Vertel Investments (Pty) Ltd

Respondent

Complaints and Compliance Committee

JCW van Rooyen SC

(Acting Chairperson)

N Ntanjana

(CCC Member)

J Tlokana

(CCC Member)

T Ramuedzisi

(CCC Member)

N Batyi

(CCC Member)

Z Ntukwana

(CCC Member)

Finding

JCW VAN ROOYEN SC

[1] Mr. Neepal (“the inspector”), an inspector in the service of Independent Communications Authority of South Africa (“ICASA”), referred a non-compliance matter to the Complaints and Compliance Committee (“CCC”) in terms of section 17F(5)(d) of the ICASA Act. The inspector based his case on the fact that

Vertel Investments (Pty) Ltd, the holder of a Radio Dealer's Certificate and a radio spectrum license ("the Respondent"), had contravened the Electronic Communications Act 36 of 2005("the ECA") in the following respects:

1. The Respondent had, in 2010, sold radio apparatus which had not been type approved in terms of section 35 of the ECA;
2. The Respondent had, in 2010, sold a radio apparatus to a person who was not in possession of a radio frequency spectrum licence in contravention of the Radio Regulations 1979;
3. The Respondent did not keep a proper record of the sale to the third party as required by the Radio Regulations 1979.

A fourth count that the Respondent did not hold a Radio Dealer's Certificate was withdrawn, when the Respondent provided such a certificate after the charge was laid with the CCC Coordinator.

[2] The Radio Regulations 1979 were, by virtue of section 95(1) of the ECA, 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 has a frequency spectrum licence in terms of the ECA and is a Radio Dealer in terms of the Radio Regulations 1979.

[4] In so far as the first alleged contravention is concerned, the Respondent argued that it had not contravened section 35 since it was not clear that the apparatus sold to the third party fell in the category of apparatus which had to be type approved, since the apparatus which was sold only had a receiving function. It was stated on behalf of the Respondent that in the past officials from ICASA had said to it that this particular category was not subject to type approval in terms of the ECA. However, the Inspector argued that it was clear that section 35 was indeed applicable. The section provides as follows:

35. (1) No person may use, supply, sell, offer for sale or lease or hire any type of electronic communications equipment or electronic communications facility, including radio apparatus, used or to be used in connection with the provision of electronic communications, unless such equipment, electronic communications facility or radio apparatus has, subject to subsection (2), been approved by the Authority.

(2) The Authority may prescribe—

- (a) The types of equipment, electronic communications facilities and radio apparatus, the use of which does not require approval where such equipment, electronic communications facilities and radio apparatus has been approved for use by the European Telecommunications Standards Associations or other competent standards body where the equipment complies with type approval standards prescribed by the Authority; and
- (b) Circumstances under which the use of equipment, electronic communications facilities, radio apparatus and subscriber equipment does not require approval, including uses for research and development, demonstrations of prototypes and testing.

“Radio apparatus” is defined as follows in the ECA:

“**radio apparatus**” means an electronic communications facility which is capable of transmitting *or receiving any signal* by radio, excluding subscriber equipment, if such subscriber equipment is used solely for that purpose; (emphasis added)

[5] From this definition it is clear that receiving equipment does fall under “radio apparatus”. Exemptions in terms of section 35(2) have not yet been prescribed by way of Regulations and, accordingly, the Respondent is wrong in its view that the apparatus sold does not fall under section 35(1) and, accordingly, does not have to be type approved.

The Respondent sold radio apparatus, which is not type approved, to the third party and is, accordingly, in contravention of section 35(1). Intention (*dolus*), which includes knowledge of unlawfulness, is not, in our view, a requirement for this contravention. Negligence (*culpa*) would suffice. As a Radio Dealer the Respondent should know what the legal position is. Where it is uncertain as to the legal position, it should have obtained legal opinion on the matter. A lawyer would immediately have pointed out that receiving equipment does fall under radio apparatus, unless exempted by Regulation in terms of section 35(2). The vague references to “officials at ICASA” is not a defense. If an official makes a statement, that statement should be in writing. Even then, the law is abundantly clear: receiving equipment also falls

under section 35 of the ECA. The Respondent is, accordingly, found to have contravened section 35 of the ECA.

[6] In so far as the second alleged contravention is concerned, section 31(5) of the ECA provides as follows:

31. (1) Subject to subsections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio *except under and in accordance with a radio frequency spectrum licence granted by the Authority to such person in terms of this Act.*(emphasis added)

From the above provision it is clear that radio apparatus may also not be sold to a person who does not have a radio frequency license. The seller would at least be an accomplice to a contravention of section 35. The Radio Regulations 1979 Chapter 2 A1 further provide that details of the licence of the person to whom a radio apparatus is sold must be written into a register. It is common cause that this was not done and, in any case, that the person to whom the apparatus was sold, was not licensed. The Respondent conceded that this omission had occurred and stated that this omission “must have fallen through the cracks”. Having regard to the correspondence between the Inspector and Mr. Du Plessis from the Respondent and in the absence of a better explanation, it is hard to not come to the conclusion that the Respondent was, in regard to this sale, not acting in total disregard of the Radio Regulations and section 31(1) of the ECA. One of the forms of intention is intention by way of foreseeing a possibility and then, nevertheless, carrying on in total disregard of that possibility (*dolus eventualis*). In *S v Beukes* 1988(1) SA 511(A) at 522C Van Heerden JA said the following in regard to how a Court infers such intention.

“’n Hof maak dus ’n afleiding aangaande ’n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, *redelik moontlik* was dat die gevolg sou intree. Indien so ’n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het.”

(emphasis added).

In *S v Lungile and Another* 1999(2) SACR 597(SCA) at par [17] Olivier JA said the following in this regard:

“In the present case, the crucial question therefore is whether the State proved beyond a reasonable doubt that the first appellant in fact did foresee...that the death of a person could result from the armed robbery in which he participated. In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of

deductive reasoning. Because such reasoning can be misleading, one must be cautious. *Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.*"

(Emphasis added).

Also compare *R v Myers* 1948(1) SA 375(A) per Greenberg JA.

Our conclusion is that from an administrative point of view the Respondent, through its employees and directors must have known that its business could not sell radio apparatus to a person without a radio frequency spectrum licence. In fact, whoever sold the apparatus at the business would seem to not have cared at all what the position of the purchaser was as to such a licence. In our view this state of mind amounts to *dolus eventualis* – foresight of a possibility of a contravention and nevertheless acting without any respect for the regulation. This state of mind of the relevant employee or director who sold the apparatus becomes, by way of vicarious responsibility, the state of mind of the Company. Even in day-to-day sales of television sets licences are required before a sale may be concluded. We are, accordingly, not satisfied with the Respondent's explanation that it was one of those matters which simply "had fallen through the cracks". It is this kind of approach to duties which could, if repeated, form a basis for a suspension of a licence or even the withdrawal of a licence – see section 17(2)(d) of the ICASA Act.

[7] As to the third alleged contravention, the Inspector argued that the Respondent had not reacted with due speed in providing a copy of the Register to him. Within four days the Respondent notified the Inspector per email that he had found the invoice and ultimately, although within about seven days, the invoice was provided. The Regulation does not provide anything about a period within which these details must be provided, except in the case of the SABC, where sound radio sets and television sets are concerned. The issue in this case is, however, whether a record was kept and shown to have been kept. The mere fact that a number of days had gone by before the invoice was delivered to the Inspector, does not necessarily mean that a record was not kept. In fact, it emerged that a record had been kept and that the record showed that the Respondent had not complied with the requirement

that details of the licence of the purchaser be provided. There was, accordingly, no contravention of this Regulation: a record had been kept.

The CCC believes that it would be in the interest of clarity and of fairness if the Inspector stated within how many days the necessary evidence of the sale must be delivered to him. However, once again, the mere non-delivery before a few days have gone by, is not necessarily conclusive evidence that the register had not been kept. Of course, if an unreasonable period has gone by, an inference of not having registered could be drawn.

Sanction

[8] The ICASA Council, on the advice of the CCC, imposes the sanction. Sanctions range from an order to desist, paying a fine as prescribed or ordering remedial action which would not be in conflict with the Act or underlying statutes. Suspensions of the licence for a maximum of 30 days and a cancellation or amendment of the licence are remedies which may only be imposed upon repetition.

The CCC proposes the following sanctions to the Council of ICASA:

1. As to count 1: **That Council orders the Respondent to desist from receiving equipment type approved as prescribed in section 35 of the ECA.** If this order is not abided by it amounts to a criminal offence in terms of section 17H of the ICASA Act.
2. As to Count 2: No fine was prescribed at the time of the contravention in 2010 for providing a person, who does not have a radio frequency license, with radio apparatus. This is the kind of contravention which, as a result of its serious nature and the seemingly ill-informed approach of the licensee in regard to whom it may sell to, would have justified a fine of R100 000. In fact, had the present conduct amounted to a repetition, the licence of the licensee could have been suspended for a month. **However: Without a fine having been prescribed, the CCC has no choice but to simply advise Council that it orders the licensee to desist from selling equipment to persons who do not have a radio frequency licence.** If this order is not complied with, it will amount to an offence in terms of section 17H of the ICASA Act.

J.C.W. van Rooyen

JCW van Rooyen

Acting Chairperson

Members N. Ntanjana, T. Ramuedzisi, J. Tlokana, Z. Ntukwana and Councillor Batyi agreed with the judgment of JCW van Rooyen