

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 10 March 2017

CASE NUMBER 235/2016

IN RE: ICT - WORKS (Pty) Ltd

PANEL: Prof JCW van Rooyen SC; Councillor N Batyi; Ms N Maseti, Prof K Moodaliyar; Mr J Tlokana; Ms M Ramokgopa

Duane Gallie (Legal Adviser), Naglir Tuganador and Vincent Smith from ICT Works

From the ICASA's Licensing and Compliance Department: Mr M Nkosinkulu

In attendance from the Office of the Coordinator: Adv. Lwazi Myeza
Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 15 January 2009 ICT Works (Pty) Ltd ("ICT") was issued with an Individual Electronic Communications Network Licence and an Individual

An Independent Administrative Tribunal at the Independent Communications Authority of South Africa. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and referred to Council of ICASA for noting. Where a complaint was filed by a member of the public and the complaint is dismissed, that member of the public may take the decision of the CCC on review to a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided on the sanction, the final judgment is issued by the Complaints and Compliance Committee's Coordinator.

Electronic Communications Service Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”) in 2013, alleging that the licensee had not filed financial statements for the year-ends 2006 to 2012 and that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”). There had also been earlier letters to ICT from the Manager ECS and ECNS. There would, however, have seemed to be a changed of e-mail address, which led to the emails not having reached ICT.

[2] After the charge sheet was sent to ICT by the CCC Coordinator’s Office in 2015, the defence was that ICT had not done any business in terms of its licences by January 2015. It was common cause that ICT was not aware of the fact that the 2011 Standard Regulations required it to commence operations on the first licence within six months and the second licence within twelve months of its issue. If that did not happen an application had to be lodged with ICASA before these terms ended for permission to only commence operations later.

[3] On 16 September 2011 ICASA issued a General Notice in the *Government Gazette* calling upon all licensees to furnish annual financial statements to ICASA and to further provide proof of payment of USAF and general licence fees for the period 2011/12 to enable ICASA to carry out its duties. This notice further informed licensees of the interest and late penalty which would be levied on any USAF payments after the prescribed period. It also instructed licensees to provide their latest contact details to ICASA. In April 2012 ICASA issued a further General Notice calling upon licensees to submit their audited financial statements or financial statements signed and sworn to by their accounting officer for the 2012-2013 compliance assessment term. Licensees were also informed that, if they had not commenced operations, they had to submit a formal letter stating that they had not commenced operation. The latter was, however, not framed in a manner that one could reasonably infer that it could amount to a contravention of the relevant Regulations if a licensee did not apply for such an extension. There was no reaction from ICT to any of these Notices. These notices were copied on the website of ICASA.

THE ISSUES

[4] The defence put forward by ICT was that it had *bona fide* believed that it was not in contravention of the Regulations if it was not operational. In so far as the

omission to apply for condonation for not being operational is concerned, this omission was not included in what may be called the charge sheet before the CCC. It is a basic principle of procedural justice that no person may be found guilty of a crime or a contravention of an administrative regulation if that contravention was not validly included in the charge sheet. For the Coordinator or the CCC itself to add a charge in the matter before it, would be in conflict with the constitutional principle of legality. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA). In this matter a charge was added to the charge sheet by an official who was not empowered to do so. That charge was set aside by the Supreme Court of Appeal. Judge of Appeal Mhlantla stated as follows:

[29]...In my view, Janzen (however misguided), acting on behalf of the HPCSA, in deciding on and proceeding to add the additional charge, was engaging in administrative action. His decision clearly falls within the definition of "administrative action" and is in the ordinary course subject to review for lack of statutory authority in terms of section 6 of PAJA.

[30] Even if this were not so, the committee and the pro forma complainant exercised public power, purportedly in terms of the provisions of the Act and the regulations. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*, the following was said in paragraph 40:

"It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be reviewed by the Courts. The exercise of such powers, like the exercise of the powers of all other organs of State, is subject to constitutional review which . . . includes review for 'legality' . . ."

[31] The principle of legality is implicit in our Constitution and applies to every exercise of public power, thus providing an essential safeguard even when action does not qualify as "administrative action" for purposes of PAJA or the Constitution. As stated by Sachs J in *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amicus curiae)*:

"The constitutional principle of legality is of application even when the action in question is an exercise of public power that does not qualify as 'administrative action' . . ."

The principle of legality requires that "power should have a source in law" and "is applicable whenever public power is exercised. Public power . . . can be validly exercised only if it is clearly sourced in law".

[32] The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not "sourced in law" and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside. The inquiry, if it continues, can relate only to the multiple relationships charge. (Footnotes omitted)

It is true that the CCC has an investigative function, but that does not mean that it may add a charge to the charge sheet during that investigation. It may, in any case, only exercise that investigative function within the rules of fairness, according to the Constitutional Court.² Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court

of Appeal, as cited above.

FINDING ON THE MERITS

It should be mentioned that the documentation placed before the CCC was a true example of how a defence should be prepared. Full documentation as to what ICT planned for the future and confirmation by an Auditor that it had not been active in terms of its licences and the relevant Regulations.

[5] The CCC concludes as follows:

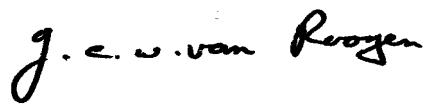
(a) ICT failed to file financial statements for the years when it was not operational. This was due to a *bona fide* error which caused the USAF fund no loss, since there had been no turnover resulting from operations in terms of the licences. The omission in the Government Notices referred to above to state that financial statements also *had* to be filed, even if the licensee was not operational, supports the finding that ICT had been *bona fide*. It was also clear from ICT's presentation before the CCC that ICT was a well organised company with clear plans for the future.

² *Islamic Unity Convention v Minister of Telecommunications 2008 (3) SA 383 (CC) at para [49.]*

(b) Since there was no income from the operation of the licences, the Universal Services and Access Fund suffered no loss.

(c) ICT was not charged with not having filed an application to commence operations at a later stage. In the documentation before the CCC it has, however, made out a case for being granted a reasonable opportunity to become active under its licences. For regulatory purposes it must, however, file the necessary application with Compliance (ECN and ECNS) at ICASA - if it has not already done so at the stage when this judgment is issued. If it has become operational in terms of its licences then, of course, it must commence filing its annual financial statements within six months of its year end.

[6] The charge against ITC is not upheld and, accordingly, no advice to Council of ICASA is made as to an order against ICT.



JCW VAN ROOYEN SC

Chairperson

12 April 2017

The Members agreed with the judgment