

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 7 March 2019

Case Number: 298/2018

REFERRED BY: COMPLAINTS AND COMPLIANCE AFFAIRS ICASA

RE: JAZZ SPIRIT 1354 CC T/A VIRTUAL PRE-PAID NETWORKS LLC [NOW TELECEL GLOBAL (Pty) Ltd]

COMMITTEE Prof Kobus van Rooyen SC (Chairperson)
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkhulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

Complaints and Compliance Affairs ICASA: Mr B Makola, Ms R Kgomo, Ms Veronica Matsane, Ms Carol Mhlongo and Mr Emanuel Mpenjani.

On behalf of JAZZ SPIRIT 1354 cc: Mr A Kotze and Ms S Makda (Attorneys)

From the Coordinator's Office: Mr Siyakah Plaaty; Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN

INTRODUCTION

[1]The General Manager: Compliance and Consumer Affairs ("CCA") at the Independent Communications Authority of South Africa ("ICASA"), who has a

¹ An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it by the Authority or filed with 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 on complaints from outside ICASA in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator. Such a decision is, on application, subject to review by a Court of Law. Where a complaint is not upheld by the CCC, the finding is also referred to Council.

delegated monitoring function in terms of the ICASA Act 13 of 2000, as amended, referred a matter concerning Jazz Spirit cc (after 7 March 2017 :Telecel Global(Pty) Ltd) a licensee in terms of the said Act, to the Complaints and Compliance Committee (“CCC”) for adjudication. An IECS and an IECNS licence had been issued to it by ICASA in 2010. The 100% shareholder was indicated as Jean Marlon Henstock. Ownership by persons from historically disadvantaged groups was indicated as “Not applicable.”

[2] On 7 March 2017 the Companies and Intellectual Property Commission (“CIPC”) informed the licensee, Jazz Spirit (Pty) Ltd (in the meantime converted into a company) under its new registered name – Telecel Global (Pty) Ltd - that it had received the amendment of the name of the Company and recorded it.

CHARGE

[3] On the 26th of March 2018 the Acting Senior Manager of Compliance at ICASA informed Jazz Spirit (then already Telecel Global (Pty) Ltd) that it had contravened section 13(1) of the ECA by having transferred the control of its two licences without having acquired the prior authorisation of ICASA, as required by section 13(1) read with section 13(2) of the ECA as amended on 21 May 2014. The relevant sub-sections of the section provide as follows:

13. Transfer of individual licences or change of ownership

- (1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, **and the control** of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.
- (2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or **transfer control** of an individual licence may be made to the Authority in the prescribed manner. (Emphasis added)

[4] In an affidavit dated 13 September 2018 a director of Telecel Global (Pty) Ltd (the earlier Jazz Spirit cc transformed into a company) filed its defence to the allegation that there had been a contravention of section 13(1) read with section 13(2) of the ECA. He argued that there had not been a transfer of control in terms of section 13(1). He stated that in 2013 Telecel Global entered into an agreement with the previous holders of the members’ interests in Jazz Spirit cc. Due to the nature of the entity (a close corporation) they were unable to change

details of Jazz Spirit cc immediately, since intermediary steps were being followed. Accordingly, the membership interest was first changed to reflect the details of an employee of Telecel (Ms K). The change of details was sent to ICASA on 3 December 2013. ICASA was requested to postpone in processing the 2013 Notification due to “upcoming changes to the company and shareholding details – undertaking to include all changes when attending to the upcoming changes for ease of processing.” Telecel then attended to the converting from a close corporation to a Company with limited liability and updating the shareholding of the Company. Once this was done, they attended to notifying the Authority of the updated details by submitting form O (Notification of Change of Information) on 17 February 2014, which form was attached. The Authority confirmed receipt of the 2014 notification on 18 February 2014, including confirmation from the Authority that the details were updated. However, the licences as such did not reflect the updated information.

[5]The amendments which were made after 21 May 2014, when section 13(1) of the ECA was amended, were the following: on 17 March 2017 the Authority was notified of the change of certain details – specifically the name change of Jazz Spirit to Telecel Global(Pty) Ltd, change of contact person, contact details and change of shareholding to Telecel Global (Pty) Ltd (previously Exxon Telecom Ltd) to holding 100% of the issued shares of the company. The 2017 Notification followed a global restructuring and rebranding exercise by the Telecel (previously Exxon) Group.

THE ISSUE BEFORE THE CCC

[6] For ease of reference, sub-sections 13(1) and (2) of the ECA, as amended in May 2014, are repeated:

13. Transfer of individual licences or change of ownership

- (1) An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, **and the control** of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority.

- (2) An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or **transfer control** of an individual licence may be made to the Authority in the prescribed manner. (emphasis added)

Mr Kotze, the legal representative of Jazz Spirit 1354 cc (now Telecel Global (Pty) Ltd), argued that section 13(1) and (2) do not apply to the present facts. The CCA argued that by transferring 100% of the shares to Telecel Global (Pty) Ltd, *control* of the licence had been transferred.

[7] The following words were added by Parliament to section 13 of the ECA, with effect from 21 May 2014:

and the control of an individual licence may not be assigned, ceded or in any way transferred to any other person without prior written permission of the Authority. (Accent added)

It was argued by Mr Kotze that essentially the transaction did not amount to a contravention of section 13(1). In the written defence to the matter it was contended that ICASA would be intruding upon the protected internal sphere of the licensee if it were to require that an application in terms of section 13(2) should have been lodged in this matter. In any case, section 13 only applied – so the argument ran - to cases where the control was transferred to an outside person or legal entity - in other words, not within the company, as took place in this matter.

[8] As authority Mr Kotze referred the CCC to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,² where the following approach to interpretation of legislation was stated by the Supreme Court of Appeal:

*“The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document **as a whole** and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the **language** used in the light of the ordinary rules of grammar and syntax; the **context** in which the provision appears; the apparent **purpose** to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is **objective** not subjective. A **sensible** meaning is to be preferred to one that leads to*

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262 at para [18].

*insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to **substitute** what they regard as reasonable, sensible or business-like for the words **actually** used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

The SCA further explained as follows in *Endumeni* at para [19]:

[F]rom the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said: 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'"

It continued at para [25]:

*"Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary **grammatical** meaning of the words used. However that too is a **misnomer**. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, **divorced from the broad context of their use**, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to **glaring absurdity**, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity." (emphasis added)*

The Constitutional Court has repeatedly cited the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* with approval.³

LEGAL ARGUMENT DECIDED

[9] There is no absurdity, in terms of *Endumeni*, in the addition of the 2014 words to section 13. It was clearly intended to widen the section, so as to address transfer of control also by a shareholder or shareholders to another shareholder or shareholders (or members' interests in a cc) *within* a company or e.g. to another member within a close corporation. The *context*, in terms of *Endumeni*, demonstrates that if the pre-2014 provision had not been added to, the shareholders or a shareholder or a member of a licensee could transfer 99% of its share within the company or interest in a close corporation and then simply inform ICASA, the Regulator, of the *change* in shareholding or the membership interest *within* the licensee. ICASA, as the Constitutional Regulator, has a Constitutional duty to ensure that, for example, the aims of section 9 of the Constitution of the RSA are protected and promoted within the industry that it regulates.⁴ It needs to know who is in control of a licence which it originally granted. Therefore it is logical, necessary and makes good business and Constitutional sense that licensees must obtain prior approval from ICASA if they transfer control, also *within* an existing company, close corporation or other entity, such as common law co-owners. No other legislative intention could reasonably be inferred from the 2014 addition to section 13. In fact, the addition to section 13 speaks for itself. When *control* of a licence is transferred *within* a company *et cetera*, ICASA must be approached for permission *beforehand*. It amounts to a substantial change to the core of a license, with which ICASA has entrusted a licensee. In the present matter *control* was clearly transferred from

³ See, for example, *KwaZulu-Natal Joint Liaison Committee v MEC Department of Ed, such as common law co-owners*. See *KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 129; *Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and Others* [2017] ZACC 43; 2018 (2) BCLR 157 (CC) para 28; *Food and Allied Workers' Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* [2018] ZACC 7 para 186.

⁴ See s 9 of the Constitution of the RSA: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.(2)Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.(3)The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

the 100% shareholder of Jazz Spirit (Pty) Ltd - formerly a close corporation, when the licences were awarded to it and later on, before the amendment of section 13, transformed into a Company (Pty) Ltd. The CCA does not dispute that a form "O" had been filed in 2014 – it set out the permissible amendments to the licensee. However, it is clear that after the amendment of section 13 of the ECA in 2014 Telecel became a shareholder of Jazz Spirit which had, in the process, also undergone a name change. The ultimate result of the negotiations led to Telecel becoming a shareholder of the earlier Jazz Spirit and effectively gaining full control of the earlier Jazz Spirit, which had become Telecel Global (Pty) Ltd.

[10]The argument that there was a conflict between a regulation and the amended section 13 need only be stated to be rejected. Section 13, as amended, is a section of the ECA and regulations are effectively amended by such an amendment to an Act which, obviously, gets priority above regulations where there is conflict between them. We quote from the affidavit of Mr Hussein, a director of Telecel Global (Pty) Ltd:

"The Company had previously been held by the parties as reflected on the licences... we entered into an agreement (but) we were not able to change the ownership details of the company until some intermediary steps had been followed. Accordingly, the membership interest was first changed to reflect the details of an employee of Telecel Global (Pty) Ltd and a form "O" with the previous holders of the company (read close corporation) in terms of which we purchased 100% of the members' interest in the Company (read close corporation). Due to the nature of the entity (being a close corporation) we requested that the Authority hold off on processing the 2013 notification due to upcoming changes to company and shareholding details...

We then attended to converting from a close corporation to a company with limited liability and updating the shareholding of the company."

After that the shareholding had, according to the affidavit, been updated and the Authority was informed of the changes by filing a Form "O".

The affidavit then sets out changes which were made after the amendment of section 13 of the ECA. On 17 March 2017, the Authority was notified of a change of details: the name change of Jazz Spirit 1354(Pty) Ltd to Telecel Global (Pty) Ltd etc. Change of shareholding was included in the notification. The shareholding would in future be held 100% by Telecel Global (Pty) Ltd. It is stated that the latter had, prior to the changes, exercised control "directly and indirectly" in the licensee. 9% of the shareholding was held by an employee of

Telecel Global Ltd and the shareholding was exercised indirectly through the employee.

FINDING

[11] After studying the affidavit referred to above, the CCC came to the conclusion that it was irrelevant in law that Telecel had exercised control through an employee. Its shares were 50% and ultimately it changed to 100%. The 50% was clearly not control, whatever the relationship with the employee was. On paper it was 50%. The 50% became 100% and therefor control was transferred *after* the amendment of section 13 of the ECA. The law does not permit such a manipulation via an employee. Each transaction must be studied to determine the true legal basis thereof. Telecel held a 50% share itself. It is irrelevant that it could control the vote of an employee. That was, legally, irrelevant. The basic rule of Roman Dutch Law which, in this respect, is still part of our present South African Law, is “plus valet quod agitur quam quod simulate concipitur” – compare Innes JA in *Zandberg v Van Zyl* 1910 AD 302 at 309:

“Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. ***Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character.*** They call it by a name, or give it a shape, intended not to express but to disguise its true nature. *And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be.* The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.” (Accent added to English)⁵

⁵ Plus valet quod agitur quam quod simulate concipitur, translated: what truly takes place is relevant in law, not what the parties simulate it to be. See e.g. *Roshcon (Pty) Ltd v Anchor Auto Body Builders* CC 2014 (4) SA 319 (SCA).

[12]The CCC, accordingly, finds that control was transferred within the company after the amendment of section 13(1) of the ECA in 2014. 50% became 100%. The *de facto* control over the vote of the employee does not amount to *legal* control. Thus: section 13(1) read with section 13(2) of the ECA had been contravened. ICASA, as Constitutional Regulator, had the right to be informed of such an amendment of control. ICASA has the right to lift the corporate veil and is, of necessity, entitled to be informed and remain informed as to who the shareholders, partners or owners are and what their share or relative ownership in a licence is. And, when *control* is transferred, to be approached for permission *before* the transfer of control takes place. This was not done in the present matter and section 13(1) read with section 13(2) of the ECA had been contravened.

[13]It should be mentioned that the argument that section 13(1) is not accompanied by a provision that provides for the imposition of a fine, is not correct. The ICASA Act explicitly, as amended in 2014, provides for the possibility of a sanction wherever it is not mentioned explicitly, also in the ECA – see section 4(3)(p) of the ICASA Act as amended in 2014.⁶

CULPABILITY

[14]What now remains to be decided is whether the contravention by Jazz Spirit 1354 (Pty) Ltd of section 13(1) was culpable – and this would apply to whatever its name had further been changed to. It has often been stated by the CCC that the mere fact that an omission to abide by legislation or a licence condition in terms of legislation is legally attributable to a licensee, is dependent on whether it had intentionally or negligently not abided by such licence condition or legislation.⁷ The matter of ownership and control of a licence is a matter of public interest and to only hold licensees who have acted with intention (which includes the foresight of possible unlawfulness) responsible, would clash with the clear intention of Parliament to prohibit the internal or external transfer of control in a license issued by ICASA, without *prior* permission by ICASA. Negligence would thus also be sufficient for a finding to be made against a

⁶ (p) except where section 74(1) of the Electronic Communications Act applies,[the Authority] must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

⁷ According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention). However, this has not been the approach of the CCC in applying section 13 of the ECA.

licensee. The legal question is what a reasonable licensee would have done in the same circumstances. It must be accepted that Parliament amended section 13(1) to include instances where a licensee resolves to transfer the control of a license to a new or existing member or shareholder or co-owner. Licensing is, indeed, of such an importance that the ICASA Act does not permit the Council of ICASA to delegate licensing to e.g. a Councillor or a Committee. It has to take this decision as a Council – thus, at the highest level within ICASA.⁸

The CCC has come to the conclusion that Jazz Spirit 1354 (Pty) Ltd should, as a reasonable licensee, have realised that permission must be obtained from ICASA before control is transferred, also within a license. The name change would not have any effect on what happened.

ADVICE TO COUNCIL

[15] The CCC has found that Jazz Spirit 1354 (Pty) Ltd, now Telecel Global (Pty) Ltd, has negligently permitted transfer of control within the licensee in conflict with section 13(1) of the ECA and that Jazz Spirit 1354 (Pty) Ltd, now Telecel Global, has negligently contravened section 13(1) read with section 13(2) of the ECA.

The CCC does not believe that the imposition of a fine is appropriate in the present matter.⁹ The amendment to section 13 of the ECA in 2014 was, of course, an innovation and from the evidence which the CCC has heard in previous matters and this matter, it would seem that a substantial number of licensees were unaware of this amendment. Of course, that is no excuse, but the ignorance of the amendment was not intentional and that tends to alleviate the contravention. However, as pointed out, the reasonable licensee should have known that the Act had been amended and have taken legal advice on such amendments – and, in any case, in this particular case. Even where legal advice was sought, it would only have removed an *intentional* transgression, had the legal advice been wrong. It is not as if the 2014 amendment was made in vague terms: it is abundantly clear that permission must be sought, also when control is transferred *within* a licensee's holding structure.

Section 17E (2) of the ICASA Act provides as follows

- (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

⁸ See section 4(4)(f) of the ICASA Act.

⁹ Although argued that the ECA does not provide for a fine, the ICASA Act was amended in 2014 to provide for a fine. See section

- (c) direct the licensee to take such *remedial* or other steps **[not]** in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee; (Accent added)¹⁰

[16]The CCC advises the Council of ICASA to consider making the following Order:

1. Find the internal transfer of the controlling share in Jazz Spirit 1354 (Pty) Ltd to have been a nullity from the outset.
2. Direct Jazz Spirit 1354 (Pty) Ltd (now Telecel Global (Pty) Ltd) to do the following:
 - (a) Immediately cancel the registration following upon the transfer of control with the Companies and Intellectual Property Commission and copy ICASA with such cancellation *and* the de-registration thereof with the CIPC;
 - (b) Re-apply to ICASA for the transfer of control if it is so resolved; and
 - (c) Await the resolution of the Council of ICASA in this connection.



JCW van Rooyen SC

25 June 2019

The Members agreed

¹⁰ The “not” which was not included by the Legislature is added to make sense of the provision. This is permissible according to the Supreme Court.