

COMPLAINTS AND COMPLIANCE COMMITTEE¹

DATE OF HEARING: 25/2/2019

CASE NO: 299/2018

RE: THE MATTER OF: NEOLOGY (PTY) LTD

TRIBUNAL
Prof Kobus van Rooyen SC
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Mr Jack Tlokana

From Compliance and Consumer Affairs ICASA: Mr Moyeni Nkosinkulu and Mr Emmanuel Mpenyani (CCA)

For the Respondent: Ms Livia Dyer (Bowmans – Attorney); Ms Tracey Byron (Legal Counsel for Rain Group Holdings); Mr Regardt van De Vyver (Network Architect Rain Networks (Pty) Ltd); Mr Phumlani Moholi Chairperson Rain Networks; Ms Mlindi Joseph Kgamede (Head of Regulatory Affairs Rain Group Holdings)

CCC Assessor: Ms Meera Lalla

CCC Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN

[1] The General Manager: Compliance and Consumer Affairs (“CCA”) at the Independent Communications Authority of South Africa (“ICASA”), who has a delegated monitoring function in terms of the ICASA Act 13 of 2000 referred a

¹ An Independent Administrative Tribunal (recognised as a s 33 of the Constitution of the RSA Tribunal by the Constitutional Court) at the Independent Communications Authority of SA (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 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 or references from within ICASA which it receives against licensees 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 against the licensee. Council then considers the 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. Decisions are subject to Review by the High Court. Judgments in which the complaint is not upheld are also referred to Council.

matter concerning Neology (Pty) Ltd, a licensee in terms of the said Act, to the Complaints and Compliance Committee (“CCC”) at ICASA. The Reference is based on the allegation of non-compliance with section 13(1) of the Electronic Communications Act 2005 (“ECA”), as amended in May 2014.

THE ISSUE

[2] At the core of the Reference to the CCC lies the issue whether Neology had contravened section 13(1) of the ECA. Section 13(1) of the ECA, as amended in 2014, provides 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.

[3] At the hearing of this matter it became clear that not all the information was available to the CCC and a directive was issued that a full analysis was necessary so as to address the question whether a transfer of control had, indeed, taken place. A further hearing was, accordingly, necessary. At the second hearing several questions were raised by the CCC as to what “control” meant within the structure of Neology. The previous matters on which the CCC has issued judgments had been straight forward and there was no doubt that control had been transferred. In the present matter, as set out by Ms Dyer on behalf of Neology, it was clear that further written argument was necessary as to what “control” meant within this particular company structure. An opportunity was granted to Bowmans attorneys to file additional heads of argument, and the summary is reproduced hereunder in paragraph [4]

[4]The summary, reads as follows:

4.1 Multisource Critical Communications (Pty) Ltd acquired 100% of the shares in Neology in 2013. Although there was a transfer of control of Neology’s individual licences at this time (because MST acquired the ability to vote a majority (50% plus) of the votes that may be cast at a general meeting of the company), there was no requirement for Neology to seek ICASA’s prior approval for the transaction. This was because the transfer of control approval requirement had not yet been introduced into the ECA and the requirements of the Ownership and Control Regulations did not apply to Neology.

4.2 In 2014, Shingi Trust, Institutex and Ata Capital acquired shares in Neology and MST's economic interest in Neology was diluted from 100% to 45%. However, MST continued to control Neology since, although it held less than 50% of the shares of the company, it was the largest single shareholder in Neology and it exercised control of all Neology's day-to day operations. In 2016, MST again acquired more than 50% of the shares in Neology when it acquired the 10% shareholding interest held by Shingi Trust.

4.3 The word "control" is not defined in the ECA. As such, it is necessary to apply relevant principles of statutory interpretation to ascertain what "control" means in the context of section 13(1) of the ECA. This requires an examination of: the language that is used in the section, the context in which the section appears, the apparent purpose, and the background against which the provisions were included in the ECA. The context and background against which the requirement to obtain approval for the transfer of control of a licence were included in the ECA includes that the notion of "control" of a juristic person is expressly dealt with in a number of statutes. Of most direct relevance, the concept is defined in both the Companies Act in section 2(2) and 3, and the Competition Act 89 of 1998, in section 12(2). While the definitions adopted in these statutes are not determinative of the meaning of control, as used in section 13 and 31(2A) of the ECA, they reflect a settled understanding on the part of the Legislature as to what the word "control" in the context of a juristic person means which, in light of the purpose of section 13(1) and absent any indications to the contrary, should apply equally to section 13(1) and 31(2A) – [the latter also dealing with control]

4.4 That meaning is the following: A Person is in "control of a juristic person if that person is in a position, directly or indirectly, to determine its direction and fate, its overall destiny. Control generally arises when:

4.4.1 a person holds more than half of the issued shares of a company and therefore controls the majority of the voting rights;

4.4.2 a person has such majority voting rights even though it does not hold more than half of the shares;

4.4.3 a person through its shareholding controls the composition of the Board of Directors by being able to appoint the majority of the directors; or

4.4.4 a person otherwise has the ability to materially influence the policy of the company as if it held the majority of the voting rights or the power to appoint the Board.

4.5 Control in its most extended sense might even arise where a minority shareholder has the ability to veto corporate conduct on strategic matters (referred to as “negative control”). Negative control does not arise simply where a person has the ability to block or veto any decision in respect of a company that must be taken by special resolution. Negative control arises only where a person has the ability to lock or veto any decision in respect of a company that must be taken by special resolution. Negative control arises only where a shareholder is able to block or veto a decision in respect of strategic matters relating to the company. Where a shareholder holds sufficient voting rights to block a decision on any of the ordinary reserved matters (as set out in section 65(10) of the Companies Act) this does not amount to negative control. It is only if the list of reserved matters is extended beyond what is stipulated in the Companies Act to include additional, strategic matters that a shareholder who holds sufficient voting rights to block a special resolution will have negative control of the company.

4.6 ICASA has indicated in its Findings Document and Position Paper on the Inquiry into Equity Ownership by Historically Disadvantaged Groups and the Application of the ICT (the Findings Document) that a broad definition of control is appropriate and that “control” for the purpose of the ECA should be understood similarly to how it was defined in the Ownership and Control Regulations. ICASA also confirmed in its Reasons for Decision on the Notification for the change of Shareholding Structure filed by Cell C in respect of its Recapitalisation Transaction (Reasons Document) that, in its view, a person will control a licence-holder if it has the ability to exert material influence over the company. This is consistent with what is stated above.

4.7 In short, a person controls an individual licensee and, by extension, its licences if it holds more than 50% of the voting rights in respect of the company and/or it has the right to appoint or veto the appointment of the majority of the members of the company’s board of directors and/or if it has any other material influence over the company.

4.8 On this basis, MST acquired control of Neology in 2013 when it acquired 100% of the shares in Neology and continues to control Neology today. There has been no transfer of control of Neology’s individual licences to any other shareholder since 2013 as no other shareholder has ever acquired control rights in respect of Neology. Similarly, MST never lost control of the company because it always had the ability to exercise de facto control of the company. Accordingly, MST did not

acquire control of Neology in 2017 when it re-acquired 100% of the shares in the company and there was no transfer of control of Neology's licences at this time.

CONCLUSION

For all the reasons set out above, Neology asks that the CCC dismiss the Complaint on the basis that there was no transfer of control of Neology's individual licences on 28February 2017 and no requirement for Neology to seek permission from ICASA in relation to its acquisition of the remaining shares in Neology that it did not already own with effect from this date."

[5] After this document was filed, the Respondent was requested to file an affidavit as to whether control was not indeed transferred to Multisource Telecommunications (Pty) Ltd when its 45% control in Neology was increased to 55% - after the ECA had been amended in 2014. An affidavit of a past director of Neology, Mr P Moholi, was then filed. Mr Moholi is presently a director of Multisource Telecommunications (Pty) Ltd, which controls Neology. The core of his affidavit reads as follows:

Prior to and then during the relevant period, Multisource was entirely in control of setting Neology's budget and business plan, which formed part of Multisource's. The operations of the two companies were so integrated and inter-twined that Neology did not have a separate budget and business plan from Multisource. As explained in paragraph 24 of the First Affidavit, Multisource made all the decisions in relation to Neology's strategic direction, including deciding that Neology would pursue various different types of technology projects, such as solar panel solutions. Because Neology was operated as part of Multisource with all resources (offices, management, staff, equipment, call centre) being provided by Multisource, any activities undertaken by Neology were undertaken at the direction of Multisource's management, which included Neology's previous management, and Neology was therefore entirely dependent on Multisource to operate.

Although, as I explained in the First Affidavit, Institutex Idea Incubators (Pty) Ltd, Ata Capital(Pty} Ltd and the Shingi Trust held shares in Neology as from 13 August 2014, in practice and given the extent of the integration between Multisource and Neology, it would have been highly impractical for the other shareholders to have opposed the wishes of Multisource in the

context of shareholder decisions taken in respect of Neology. Further, given their respective shareholdings, none of these shareholders unilaterally enjoyed any ability to veto or approve resolutions from being taken. In essence, each of them deferred to Multisource as to how Neology should be run and operated.

I am advised that a person is regarded as having de facto control of a company from a legal perspective where it has decisive or material influence over the strategic business behaviour and direction of the company. Typically this exists where a person has control in respect of, amongst other things, the budget and business plan of the company, major investments to be undertaken by the company, and the appointment, firing and remuneration of senior management of the company. As I have demonstrated above, Multisource had control in respect of all these aspects of Neology's operations and, accordingly, had day-to-day, operational and de facto control of Neology during the relevant period in a manner akin to a majority shareholder.

As appears from Annexures 4 and 5 to the First Affidavit, the International Financial Reporting Standards (IFRS) were used to prepare the annual financial statements for Multisource for the financial years ended 28 February 2015 and 28 February 2016. I am advised that, in terms of IFRS, a company (a parent) that controls another is required to present consolidated financial statements. An investor controls an investee when it is exposed, or has rights, to variable returns from its involvement with the investee and has the ability to affect those returns through its power over the investee. Control requires: power over the investee, exposure, or rights, to variable returns, and ability to use power to affect returns. It is clear that owning a majority of the voting or other rights is not always required for one person to have control over another. Assessing whether one person controls another instead requires an assessment of whether the investor's power/rights are sufficient for it unilaterally to direct the activities that most affect the investee's returns. As appears from the annual financial statements for Multisource for the 2014/14 and 2015/16 financial years (excerpts from which

were attached as Annexure 4 and Annexure 5, respectively, to the First Affidavit), Neology's financial statements were consolidated with Multisource's for the relevant financial years. As appears from Neology's annual financial statements for the 2014/15 financial year (PM6) and the excerpt from Neology's annual financial statements for the 2015/16 financial year (attached, marked "PM7") (i.e. the financial years into which the relevant period fell) Multisource was Neology's holding company. This demonstrates that, for IFRS purposes, Multisource was regarded as being in control of Neology during the relevant period: Neology was a subsidiary of Multisource.

[6] From the above summary, it appears that even when Multisource only had 45% of the shares in Neology, it remained in *de facto* control for the said period. However, the fact remains that if all the shareholders were called together at a meeting of the company, the legal potential remained: Multisource had 45% and could be outvoted. Thus, although it was *de facto* in control of Neology *legally* it did not have control. Multisource, however, regained legal control when Neology's shareholders transferred a further 10% to it. But that was after section 13(1) of the ECA had been amended and required that Neology obtain *prior* permission from ICASA. The CCC is aware of the fact that there are instances where control, with less than 50%, is accepted as control (e.g. in the Companies Act), but the CCC is not convinced on the facts before it that this was, in terms of section 13(1) of the ECA, the case in the present matter. The earlier legal control remained in place *de facto*, but on a closer analysis Neology should have transferred the 10% before amendment of the ECA to ensure that Multisource was also in *de iure* control.

The finding is accordingly that section 13 had been contravened by Neology when it increased Multisource's shareholding to 55% after section 13 had been amended in 2014.

CULPABILITY

[7] What now remains to be decided is whether the contravention by Neology of section 13(1) is culpable. 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 attributable to a licensee, is dependent on whether it had

intentionally or negligently not abided by such legislation.² 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 the possibility of unlawfulness and nevertheless acting – *dolus eventualis*) responsible would clash with the clear legislative intention to prohibit the 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 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 shift 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.³

[8]The CCC has come to the conclusion that Neology has negligently contravened section 13(1) and (2) of the ECA and the complaint against it is, accordingly, upheld.

ADVICE TO COUNCIL

[9] The CCC has found that Neology transferred control in its license to Multisource in conflict with section 13(1) of the ECA and that Neology had acted negligently by not first approaching ICASA for permission to transfer control.

The CCC does not believe that the imposition of a fine is appropriate in the present case.⁴ 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 number of licensees were unaware of this amendment. Of course, that is no excuse, but the ignorance of the amendment was not intentional. However, as pointed out, the reasonable licensee should have known – probably with legal advice - that the Act had been amended. That is why negligence is found.

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

² According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention)

³ See section 4(4)(f) of the ICASA Act.

⁴ Although argued that the ECA does not provide for a fine, the Act was amended in 2014 to provide for a fine. See section

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

(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)⁵

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

1. Find the transfer of the 10% shares in Neology to Multisource to have been a nullity from the outset in terms of section 13(1) of the ECA.

2. Direct Neology 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 Neology again resolves to do so; and

(c)Await the resolution of the Council of ICASA in this connection.



JCW van Rooyen SC

4 June 2019

The Members of the CCC agreed

⁵ 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.