COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 7 March 2019 **C**ase Number: 311/2018

REFERRED BY: COMPLAINTS AND COMPLIANCE AFFAIRS ICASA

RE: OHREN TELECOM CC

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 OHREN TELECOM CC : Mr A Kotze and Ms S Makda (Attorneys)

From the Coordinator's Office: Ms M Lalla (Attorney)

Coordinator of the CCC: 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, as amended, referred a matter concerning Ohren Telecom Close Corporation

[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.

("cc"), a licensee in terms of the said Act, to the Complaints and Compliance Committee ("CCC") at ICASA for adjudication.

[2] The CCA alleged that that Ohren Telecom contravened section 13(1) of the ECA by transferring control of the cc without the required prior permission from the Council of ICASA in terms of section 13(1) and (2) of the Electronic Communications Act 2005 ("ECA").

THE ISSUE

[3] Section 13(1) and (2) of the ECA, as amended in May 2014, 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] Mr *Kotze*, the legal representative of Ohren Telecom cc, argued that section 13 only applies to the transfer of a company or a cc and not the mere internal control of the company or cc.

The following words were added by Parliament to section 13, 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

Mr *Kotze* argued that the addition of the words quoted above, was not intended by Parliament to introduce the transfer of control *within* a company or cc. He argued that if one considered the Parliamentary Debates on the amendment it was, indeed, never the intention to include transfer of control *within* a company or close corporation or any other licensee recognised in law as a corporate structure. The CCA argued that although control may, in certain circumstances, be less than e.g. 40% - for example if the relationship between shareholders is

governed by agreed rules that grants the 40% shareholder the final say – the criterion for "control" would be 51%.

[5] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] the following approach to interpretation of legislation was stated by the Supreme Court of Appeal and this approach has often been quoted with approval, also by the Constitutional Court:

"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 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 businesslike 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 went on at para [25]:

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

"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)*

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

[7] 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 *within* a company and other corporate licensees. The context, in terms of *Endumeni,* demonstrates that if the pre- 2014 provision was not added to, the shareholders or a shareholder of a licensee (or a member of a cc) could simply transfer 99% of their shares to another company, close corporation or an individual and then merely inform ICASA, the Regulator, of the *change* in shareholding *within* the licensee. ICASA, as the independent Regulator, has a Constitutional duty to ensure that, for example, the aims of section 9 of the Constitution are protected and promoted within the industry that it regulates.[4] It needs to know who is in control of a licence which it

[3] See, for example, *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, 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

originally granted. Therefore it is logical, necessary and makes good business and Constitutional sense that licensees obtain prior approval from ICASA if they transfer control, also within an existing company, close corporation or other corporate entity. No other legislative intention can be inferred from the 2014 addition to section 13. In fact, the addition to section 13 speaks for itself. If control is transferred within a company *et cetera* ICASA must be approached for permission beforehand. It is a substantial change to the license, with which ICASA has entrusted a license.

[8] In the present matter it was argued that each member of the cc has the authority to bind the cc. Which then, it was argued, demonstrates that the transfer of shares to members of the cc by the sole corporate member, did not, in any manner, divest him of his powers. This argument, with respect, loses sight of the fact that it is inherent in the close corporation structure that one member may bind the others. Compare *Point 2 Point Same Day Express CC v Stewart & Another*[5] where the High Court held as follows:

Section 54 of the Act deals with the 'Power of members to bind corporation' and provides:

(1)Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and in dealing with the corporation, be an agent of the corporation.

(2)Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of a corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom he deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

In *J & K Timbers (Pty) Ltd t/a TEGS Timbers v GL & S Furniture Enterprises CC* 2005 (3) SA 223 (N) at 227F - 228G Koen AJ said the following in regard to the section:

It seems clear that the intention of the Legislature is that every member of a corporation, merely as such, is to be an agent of the corporation for all purposes, including, even, a purpose which has nothing whatever to do with the carrying on of the actual business of the corporation, in relation to a person who is not a member of the corporation and is I 'dealing with' the corporation - see Henochsberg on the Close Corporations Act para 54.1 at 149 in the commentary on s 54. That the member is such an agent is the case even if in fact no authority, express or implied, has been conferred upon him by the corporation, and the corporation is

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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.

[5] 2009(2) SA 414(W) at 417-418:

bound by the related act unless the third party knew, or ought reasonably to have known, of the absence of such power.

. . . (T)he crux of respondent's opposition appears to arise from its belief that JK Sewpersad and its attorney could not have been entitled/authorised to sign the settlement agreement 'as no resolution was obtained from respondent to undertake such an act'. That belief is in my view misplaced as the existence of a resolution or unanimous consent of all the members is not a prerequisite to a close corporation being bound to a third party by one of its members. Section 54 of the Act is specifically aimed at avoiding the application of, inter alia, the ultra vires doctrine and the doctrine of constructive notice which applies in respect of companies, insofar as the dealings by third parties with a close corporation is concerned - see the comments of JS McLennan in 'Contracting with Close Corporations' 1985 SALJ 322 (in respect of the wording of s 54 prior to its amendment).

Even in the absence of a resolution from the remaining member (in casu Mr Gunpath Sewpersad), the respondent would be bound to the terms of the settlement agreement, in accordance with s 54(2) of the Act concluded by a member of that corporation 'unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom he deals has, or ought reasonably to have had, knowledge of the fact that the member has no such power'. In casu there was no suggestion that this was the case. It accordingly follows, and I did not understand Mr Naidoo to suggest the contrary, that, had the settlement agreement been concluded by Mr L Ganapathia signing the agreement, the respondent would be bound to the terms of the agreement."[6]

[10] I respectfully agree with the reasoning of Koen AJ …. The operation of s 54(1) is, however, not absolute. Section 54(2) makes it possible for a member of the close corporation to argue that the member who contracted with or, as in the present matter, released the third party was not authorised to do so. The mere fact that the contract or act did not fall within the ordinary course of the business would not, in itself, be a defence. However, if the third party knows or ought reasonably to have known that the member did not have authority, it would be a defence. In this sense the doctrine of ostensible authority is introduced by s 54(2).

[9] It is clear from the above that the fact that a partner in a close corporation may bind the corporation, stems from the Close Corporations Act. It, in no way, means that as a result of the fact that one member may bind the others (and in the above matter which was before the High Court an exception to the rule lies at the core of the judgment) the transfer of shares in a close corporation has no effect insofar as section 13 of the ECA is concerned. The sole member of *Ohren* transferred control to the other three members, which could outvote him in a meeting of the cc. The original member had lost control as a result of his

[6] Also compare Professor Henning (ed) *Beslote Korporasiediens* who states as follows:5.14Die bevoegdheid van 'n lid om 'n beslote korporasie te bind word in art 54 uiteengesit. Die effek is dat, sover dit bona fide buitestanders betref wat met die korporasie sake doen, elke lid van die korporasie 'n verteenwoordiger van die korporasie is. 'n Handeling van 'n lid bind die korporasie teenoor so 'n buitestander wat met die korporasie sake doen, hetsy sodanige handeling verrig is vir die dryf van die besigheid van die korporasie al dan nie.
5.15 Indien 'n lid se verteenwoordigingsbevoegdheid beperk of uitgesluit word, sal hy nogtans die korporasie teenoor die buitestander bind, tensy die buitestander kennis dra, of redelikerwys kennis behoort te dra, van die feit dat die lid in werklikheid geen bevoegdheid het om namens die korporasie in die besondere aangeleentheid te handel nie.

transferring more than 50% to the new members. There was, accordingly, a clear contravention of section 13(1). Prior permission should have been sought from the Authority in terms of section 13(2).

CULPABILITY

[10]What now remains to be decided is whether the contravention by Ohren Telecom 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.[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 unlawfulness) 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.[8]

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

ADVICE TO COUNCIL

[12] The CCC has found that Ohren Telecom's sole member transferred control in the licensee to new members in conflict with section 13(1) of the ECA and that Ohren 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.[9] The amendment to section 13 of the ECA in 2014 was, of course,

[7] According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention)
[8] See section 4(4)(f) of the ICASA Act.
[9] Although argued that the ECA doesnot provide for a fine, the Act was amended in 2014 to provide for a fine. See section

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 that the Act was amended and taken legal advice on such amendments – and in any case, in this particular case. That is why negligence is found.

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 -
>
> (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]

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

1. Find the transfer of the shares in the close corporation to the other members of the close corporation to have been a nullity from the outset.

2. Direct Ohren Telecom cc to do the following:

(a)Apply to ICASA for the transfer of the said shares to the other cc members if the members resolve to continue with the deal.

(b)Await the resolution of the Council of ICASA in this connection.[11]

JCW van Rooyen SC

24 May 2019

[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.