

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 16 March 2017

CASE NUMBER 224/2016

IN RE: ORBCOMM SOUTH AFRICA (Pty) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Mapato Ramokgopa

Assessor: Adv. Lwazi Myeza

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND AND CHARGE

[1] On 22 June 2009 Orbcomm South Africa (Pty) Ltd (“Orbcomm”) was issued with an Individual Electronic Communications Service Licence and an Individual Electronic Communications Network Service Licence by the Independent

¹ An Independent Administrative Tribunal at ICASA, which was set up by the ICASA Council in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. 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 only subject to review by 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, the final judgment is issued by the Complaints and Compliance Committee’s Coordinator. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council’s imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function under the supervision of the Chief Executive Officer of ICASA,² referred this matter on 20 June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that Orbcomm had not filed financial statements for the years 2009-2010, 2010-2011 and 2011-2012 and thus also did not pay its USAF contribution and its licence fees.

[2] The Respondent applied for condonation for not complying with the time periods as set out in the Procedural Regulations pertaining to this matter. Reasonable grounds were made out for such condonation and it was granted by the CCC. The exception,³ filed by the Respondent in regard to the period that transpired between the referral in 2013 by Compliance to the Coordinator and the notice of the contravention to the licensee only in 2016, is not upheld. There were administrative reasons beyond the control of the Coordinator that led to the matter only reaching the licensee in November 2016. By 2013 a substantial backlog of non-complying licensees had developed in the Compliance Division and this, upon referral to the Coordinator of the CCC, led to wide-ranging administrative duties in the Coordinator’s Office.

[3] It is noted that due notice was filed with ICASA as to non-activity under the license for the year 2009-2010 and that a financial statement had been filed for 2010-2011. As would appear from the next paragraph, the CCC, in any case, is not permitted in law to hear complaints as to financial years before 2011-2012.

[4] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect. Financial years before 2011-2012 cannot, thus, be part of the

² See section 4(3) (b) of the ICASA Act read with section 4(4) (a) (iii) of the same Act.

³ An exception is a remedy employed where a case has not been made out on the papers and it is consequently dismissed on that ground. In the present matter there was a reference to the time limits set in the Regulations pertaining to the CCC dated 6 October 2010 - REGULATIONS GOVERNING ASPECTS OF THE PROCEDURES OF THE COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

alleged contraventions referred to the CCC by Compliance.⁴ The Constitution of the Republic of South Africa 1996⁵ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁶ By that time, the 2010 Regulations, which came into operation in September 2011, had already superseded the regulations which were applicable to the 2009-2010 financial year. The same principle applies to the USAF contributions.

[5] It was conceded by Orbcomm that it had not filed the 2011-2012 financial statement timeously. There were, however, administrative reasons put forward for this omission. However, before this matter came before the CCC, the financial statement was filed and, as required, confirmed under oath by the Orbcomm Accountant.

FINDING

[6] The ultimate filing and payment does not, however, absolve Orbcomm from being found to have been in contravention of the relevant Regulations followed by a 2011 *Government Gazette* Notice. The Notice required licensees to file financial statements for the year 2011-2012. A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Waglines Pty Ltd and Another*⁷ Judge Didcot held that “ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*” To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would

⁴ Regulations pertaining to Individual and Class licences were published in 2010 and were made operational in September 2011. New USAF Regulations were also published in February 2011, thereby repealing earlier USAF regulations.

⁵ See section 35(3) (l). Cf. *Masiya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoi v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁶ And it is constitutionally acceptable. Thus, the death penalty could not be imposed for murder committed even before the interim Constitution of the Republic became effective in April 1994.

⁷ 1986(4) SA 1135(N).

generally suffice for a finding against a licensee. Compare *S v Long-distance Natal Pty Ltd*⁸ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Men’s rea*⁹ in the form of *culpa*¹⁰ is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (C *S v De Bloom* 1977 (3) SA 513 (A) at 532G.)

[7] Thus, even if it is accepted that Orbcomm did not act with intent in not filing the financial statement and not paying Universal Service and Access Fund (“USAF”) fees and had rectified the omission, it must still be found to have been in contravention of the 2011 Regulations. The fact that Orbcomm has, at this stage, paid its outstanding fees and filed its 2011-2012 financial statement is an extenuating circumstance in the consideration of the order which we will consider in our advice to Council. It should be mentioned in favour of Orbcomm that, as explained in its response, the company has two divisions and the administrative error in not filing was attributable to a division of functions. A detailed affidavit filed by Orbcomm’s chief operating officer, explaining the circumstances in detail, demonstrates the positive approach of Orbcomm towards ICASA and its licences. It also demonstrates the *bona fides* of Orbcomm well.

[8] Orbcomm is, accordingly, found to have been in breach of the 2011 Regulations by not having filed its 2011-2012 financial statement and paid its USAF contribution for the year 2011-2012 timeously.

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

[9] In the light of the fact that Orbcomm was *bona fide* in its omission to file the 2011-2012 financial statement and pay USAF fees for the year 2011-2012 and has now filed the statement and paid the fees, it is not necessary to issue more than a desist order in terms of section 17E (2) (a) of the ICASA Act. That subparagraph provides as follows: The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely –

⁸ 1990 (2) SA 277 (A).

⁹ Translated: “a guilty mind”.

¹⁰ Translated: negligence.

(a) direct the licensee to desist from any further contravention;

The order of Council, it is advised, should, if it agrees, read as follows:

Orbcomm South Africa (Pty) Ltd is ordered to desist in future from not filing its duly confirmed financial statements within six months after its financial year-end and paying its USAF contributions within the time limit set by ICASA.



30 April 2017

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the advice to Council on the sanction.