

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date of Hearing: 7 March 2019

Case Number: 306/2018

**REFERRED BY: COMPLAINTS AND COMPLIANCE AFFAIRS ICASA**

**RE: PAW PAW WIRELESS (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 PAW PAW WIRELESS PTY LTD: Mr A Kotze and Ms S Makda (Attorneys)

From the Coordinator's Office: Mr Thamsanqa Mtolo (LLB)

Coordinator of the CCC: Ms Lindisa Mabulu

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## 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

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<sup>1</sup> 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 Paw Paw Wireless Pty Ltd, a licensee in terms of the said Act, to the Complaints and Compliance Committee (“CCC”) at ICASA for adjudication. Two licences had been issued to it in 2009: an IECS and an IECNS.

[2] The CCA<sup>2</sup> alleges that Paw Paw Wireless Pty Ltd had contravened section 13(1) of the Electronic Communications Act 2005 (“ECA”). The sub-section had been amended on 21 May 2014 by also prohibiting the internal transfer of *control* of a licensee, without the prior permission from the Council of ICASA. The company’s name would also be amended to *Session Telecoms (Pty) Ltd* and 100% of the shares was transferred to *H & S Besigheidstrust*.

[3] The background was as follows: The original licences were issued to Paw Paw Wireless Pty Ltd in 2009. The shareholders of the company were R Jacobs, G Sepeng and V Sepeng (100% ownership having belonged to historically disadvantaged members of the community). On 8 September 2016 the Companies and Intellectual Property Commission (“CIPC”) informed the licensee, under its new registered name – Sessions Telecoms (Pty) Ltd - that it had received the Amendment of the name of the Company and recorded it. ICASA was informed of the change in Directors and that the directors would be Mr L Brinkworth and Mr Hendrik Wentzel. ICASA was also informed of the name change to Session Telecoms (Pty) Ltd.

[4] On 26 March August 2018 Paw Paw Wireless (PTY) Ltd was informed by ICASA that the transaction had amounted to an internal transfer of control of the licences to H & S Besigheidstrust. This transaction had, thus, amounted to a contravention of section 13(1) of the ECA and would be referred to the Complaints and Compliance Committee (“CCC”) for adjudication.

## **THE ISSUE BEFORE THE CCC**

[5] 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

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<sup>2</sup> This matter ( as well as four others) has taken some time to be resolved since the CCA was granted 21 days to file written heads of argument after the representative of the licensee, in his final argument on the five cases before the CCC on that day, argued an alternative argument as to the interpretation of section 13 of the ECA.

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 Paw Paw Wireless Pty Ltd, argued that section 13(1) and (2) does not apply to the present facts. The CCA argued that by transferring 100% of the shares to H & S Besigheidstrust, control of the licence had been transferred. 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. 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 expect that an application in terms of section 13 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 happened in this matter.

[6] As authority Mr *Kotze* referred the CCC to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>3</sup> 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*

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<sup>3</sup> *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 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 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.<sup>4</sup>

[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 by a shareholder or shareholders to another shareholder or shareholders *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 close corporation and then simply inform ICASA, the Regulator, of the *change* in shareholding or the membership share *within* the licensee. ICASA, as the 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.<sup>5</sup> 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. The same principle would apply to 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 licence, with which ICASA has entrusted a licensee. In the present matter control was clearly transferred from the three members to

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<sup>4</sup> 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.

<sup>5</sup> 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.

Besigheidstrust. In fact 100% was transferred and the existing three shareholders resigned as directors.

## **FINDING**

[8]The CCC, accordingly, finds that control was transferred within the company after the amendment of section 13(1) of the ECA. Thus: section 13(1) read with section 13(2) of the ECA have been contravened. ICASA, as Constitutional Regulator, has the right to be informed of such a change, since it may, inter alia, affect previously disadvantaged persons which are protected in terms of section 9 of the Constitution. ICASA, as Regulator, indeed 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.

[9]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 fine or other sanction wherever it is not mentioned explicitly – see section 4(3)(p) of the ICASA Act as amended in 2014.<sup>6</sup>

## **CULPABILITY**

[10]What now remains to be decided is whether the contravention by Paw Paw *Wireless* Pty Ltd of section 13(1) was 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 legally attributable to a licensee, is dependent on whether it had intentionally or negligently not abided by such licence condition or legislation.<sup>7</sup> 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 legislative intention to prohibit the internal or

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<sup>6</sup> (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;

<sup>7</sup> 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.

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 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.<sup>8</sup>

*The CCC has come to the conclusion that Paw Paw Wireless Pty Ltd should, as a reasonable licensee, have realised that permission must be obtained from ICASA before control is transferred, also within a license.*

### **ADVICE TO COUNCIL**

[11] The CCC has found that Paw Paw Wireless Pty Ltd has negligently permitted transfer of control within the licensee in conflict with section 13(1) of the ECA and that Paw Paw Wireless Pty Ltd has 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.<sup>9</sup> 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 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 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 -

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<sup>8</sup> See section 4(4)(f) of the ICASA Act.

<sup>9</sup> 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)<sup>10</sup>

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

1. Find the internal transfer of the 100% share in the close corporation to have been a nullity from the outset.
2. Direct Paw Paw Wireless 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

17 June 2019

The Members agreed

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<sup>10</sup> 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.