COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 10 March 2017 **CASE NUMBER 229/2016**

IN RE: PLATOON TRADE AND INVEST 44 (Pty) Ltd

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

For the Respondent: Mr K Naidoo (Director)
From Compliance: Mr M Nkosinkulu

In attendance from the Office of the Coordinator: Mr T Mtolo

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 21 January 2010 Platoon Trade and Invest 44 (Pty) Ltd ("Platoon") was issued with an Individual Electronic Communications Service Licence by the

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[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.

Independent 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 in June 2013 to the Complaints and Compliance Committee ("CCC"), alleging that Platoon had not filed financial statements for the years 2005-2006 up to and including 2011-2012. There was a reference to notices to file in the *Government Gazette* in terms of the September 2011 Standard Regulations.[3] Furthermore, the charge was that no contribution had been made in terms of the Universal Service and Access Fund ("USAF") Regulations 2011 and no licence fees paid in terms of the ICASA General Licence Fees Regulations.

[2] It should be pointed out that since the present matter was referred to the CCC in June 2013 as part of a substantial back-log of alleged contraventions by numerous licensees, the reference obviously did not include financial years later than 2011-2012. At the hearing of this matter it, in fact, surfaced that Platoon had never successfully commenced business in terms of its licence. The CCC is not permitted in law to add later financial years to the reference. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA). In this matter a charge was added to the charge sheet by an official who was not empowered to do so. That charge was set aside by the Supreme Court of Appeal. Judge of Appeal Mhlantla stated as follows:

[29]…In my view, Janzen (however misguided), acting on behalf of the HPCSA, in deciding on and proceeding to add the additional charge, was engaging in administrative action. His decision clearly falls within the definition of "administrative action" and is in the ordinary course subject to review for lack of statutory authority in terms of section 6 of PAJA.

[30] Even if this were not so, the committee and the pro forma complainant exercised public power, purportedly in terms of the provisions of the Act and the regulations. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others*, the following was said in paragraph 40:

"It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be

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

[3] Section 9 of the Standard terms and Conditions for Class Electronic Communications Systems 2010 (see the addendum to this judgment). See General Notice 36008 in the Government Gazette of 19 December 2012.

reviewed by the Courts. The exercise of such powers, like the exercise of the powers of all other organs of State, is subject to constitutional review which . . . includes review for 'legality' . . ."

[31] The principle of legality is implicit in our Constitution and applies to every exercise of public power, thus providing an essential safeguard even when action does not qualify as "administrative action" for purposes of PAJA or the Constitution. As stated by Sachs J in *Minister of Health NO v New Clicks South Africa* (*Pty*) *Ltd* (*Treatment Action Campaign as amicus curiae*):

"The constitutional principle of legality is of application even when the action in question is an exercise of public power that does not qualify as 'administrative action' . . ."

The principle of legality requires that "power should have a source in law" and "is applicable whenever public power is exercised. Public power . . . can be validly exercised only if it is clearly sourced in law".

[32] The principle of legality dictates that administrative authorities such as the HPCSA cannot act other than in accordance with their statutory powers. The decision of the pro forma complainant to include the misdiagnosis charge was not "sourced in law" and has offended against the principle of legality. The decision has to be reviewed and nullified for want of statutory power. It follows that the misdiagnosis charge has to be set aside. The inquiry, if it continues, can relate only to the multiple relationships charge. (Footnotes omitted)

It is true that the CCC has an investigative function, but that does not mean that it may add a charge to the charge sheet during that investigation. It may, in any case, only exercise the investigative function within the rules of fairness, according to the Constitutional Court.[2] Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court of Appeal and the Constitutional Court, cited above.

[3] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect and, accordingly, the earlier than 2011-12 financial statements are not permitted in law to be part of the contraventions before the CCC. The earlier Regulations were substituted by the September 2011 Regulations. The Constitution of the Republic of South Africa[4] does not permit charges to be brought under repealed legislation, unless a charge was initiated

[4] 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].

while such legislation was still in operation.[5] The allegation of omissions was sent to the licensee by the CCC Coordinator in October 2015.

Thus, only the omission to file a financial statement for the year ending February 2012 is before the CCC. That does not mean that the liability, if it had existed, to pay USAF fees and licence fees has fallen away.[6] It only means that in *this* process - which could lead to the imposition of, for example, a fine - only one financial year and duties to pay dues for that year is before the CCC.

FINANCIAL STATEMENTS

[4]A high standard of compliance is expected from a licensee and this was lacking in the present case in the sense that it should, through its director, Mr Naidoo, have at least informed Compliance that the firm was not active under its licence. Mr Naidoo, however, argued that he was under the impression that the duty to file financial statements did not apply if the licence had not been successfully operational. In *S v Waglines Pty Ltd and Another*[7] Judge Didcott 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 generally suffice for a finding against a licensee. Compare *S v Longdistance Natal Pty Ltd* [8] where Nicholson, Acting Judge of Appeal, stated as follows at 284:

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[5] 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.

[6] Claims are, of course, subject to prescription, which is probably three years in this case. See MAIZE BOARD v EPOL (PTY) LTD 2009 (3) SA 110 (D); HOLENI v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 2009 (4) SA 437 (SCA); COMMISSIONER OF CUSTOMS AND EXCISE v TAYOB AND OTHERS 2002 (6) SA 86 (T); THE MASTER v I L BACK & CO LTD AND OTHERS 1983 (1) SA 986 (A); COMMISSIONER OF CUSTOMS AND EXCISE v TAYOB AND OTHERS 2002 (6) SA 86 (T).

[7] 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

[8] 1990 (2) SA 277 (A).

"Mens 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. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

[5]Platoon was not charged before the CCC for not having applied to obtain more time to activate the licence. And, there is no obligation to file financial statements if there is no activity in terms of the licence. This is clear from the 2012 (and 2013) Government Gazette, which called upon licensees to file financial statements. Of course, if there was no activity, no financial statement could, realistically, be expected from a licensee. In any case, the intention of the financial statement is to determine what fees must be paid. If there was no activity, then that is the end of the matter. The 2013 Government Gazette did request licensees to inform ICASA if there was no activity in terms of a license. However, in no way was it communicated that a fine could be imposed if such notice was not sent.

[6] At the hearing of this matter Mr Naidoo was informed that he should, at least, fill in an application form, available at Compliance, of the inactivity in terms of the licence and also provide prospects of his business in this regard. We accept that this was done and, if not, it should be done within 30 days of release of this judgment.

FINDING

(a) The charge that the licensee did not file a financial statement for the year 2011-2012 is dismissed. There was no duty to file such a statement where the license had not been made operational. As indicated, the earlier financial years are not, legally, permitted to be part of the charge. Had they been included legally, the same decision would have been taken in regard to them.

(b) Since the licensee was not charged for not having applied for more time to make his licence operational, no finding may be made in this regard.

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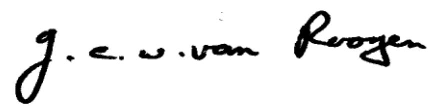
[9] Translated: "a guilty mind".

[10] Translated: negligence.

In the result the charge is not upheld.



JCW van Rooyen SC

Chairperson

The Members agreed with this finding.