

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

DATE OF HEARING: 15/2/2019

CASE NO: 305/2019

**RE: THE MATTER OF: SYBAWEB (PTY) LTD**

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

From Compliance and Consumer Affairs ICASA: Ms C Mhlongo and with her Ms K Setshedi

For The Respondent: Mr C Andreas Nel, Chief Executive Officer, Sybaweb (Pty) Ltd

CCC Assessor: Mr T Mtolo; CCC Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**PROF JCW VAN ROOYEN SC**

[1] The General Manager: Compliance and Consumer Affairs at the Independent Communications Authority of South Africa (“ICASA”), who has a delegated

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<sup>1</sup> 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.

monitoring function in terms of the ICASA Act 13 of 2000, as amended, referred a matter concerning Sybaweb Pty Ltd (“Sybaweb”), 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 of section 13(1) of the Electronic Communications Act 2005, as amended in May 2014.

## THE ISSUE

[2] At the core of the Reference to the CCC lies the issue whether Sybaweb has contravened section 13(1) and (2) of the Electronic Communications Act 2005 as amended, which 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. (accent added)
- (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. (accent added)

[3] It was common cause that Sybaweb on 16 November 2016 transferred control (51%) of its company to Siyafunda Educational Trust ( IT001853/2015). Thereafter it applied to ICASA for approval of the change of control in the Company. A form was filled in for this purpose.

[4] Mr Andreas Nel, a director of the company, represented the company at the hearing before the CCC. In defence he stated that after he had filed the necessary ICASA form for the amendment of the shareholding in November 2016, he was under the impression that everything was in order. This impression was based on contact with members of the relevant Division at ICASA up to six months into 2017. However, he received the following letter, dated 26 March 2018 from the Acting Senior Manager: Compliance at ICASA:

### SUBMISSION OF NOTICE OF CHANGE OF INFORMATION – SYBAWEB

1. The submission of change of ownership by Sybaweb (Pty) Ltd dated 21 November 2016, refers.
2. After consideration of all relevant factors, the Authority has arrived at a conclusion that the transaction concluded, amounts to a transfer of control. The Authority has reached this conclusion on the basis that

Siyafunda Education Trust has now acquired control of 51% and the Nel Family Trust has now acquired control of 29% shareholding in the Sybaweb(Pty) Ltd licences(ECS and ECNS), whereas in the past they did not have control.

3. In terms of section 13(1) of the Electronic Communications Act 2005, Sybaweb was required to obtain “prior written permission” of the Authority before transferring the control of its ECS and ECNS licences. Consequently, the Authority is of the view that Sybaweb has contravened section 13(1) of the ECA.
4. In the Authority’s view, a contravention of section 13(1) of the ECA has occurred and therefore, the Authority is legally bound to refer the matter to the Complaints and Compliance Committee for adjudication.
5. However, section 3 of the Promotion of Administrative Justice Act (2000)... deals with procedurally fair administrative action, including the right to afford a person affected by administrative action, a reasonable opportunity to make representations. Therefore Sybaweb is hereby required to provide the Authority with reasons, within ten working days of receipt of this correspondence, as to why it should not be taken to the CCC for contravention of section 13(1) of the ECA.

[5] Sybaweb filed the following response on the 11<sup>th</sup> April 2018:

Thank you for your email correspondence dated 26 March 2018 and for granting an extension to reply. ...

We are nonetheless rather surprised by the contents of the correspondence we have received, citing procedural contraventions. We are of the respectful opinion in the circumstances that these concerns, which are only now raised, should not be applicable to our Submission.

Our submission on 21 November 2016, was done under the strict guidance and advice from ICASA and indeed following the format and forms provided by our appointed ICASA officer at the time. While this all happened some time back we do recall we met with and certainly discussed our shareholding changes with our ICASA officer and we have it on record that we were sent the relevant forms to complete by Ms Veronica Matsane , our officer at the time.

We duly completed and submitted the forms electronically and sent the originals by courier timeously. ICASA further confirmed in December 2016 that our submission was in order and on time and we could expect the

amended licences in due course. There was one query raised in relation to details that we had supplied in our Submission regards a subsidiary company and it was agreed that this was superfluous additional information that we need not have provided and was consequently not relevant to our Submission.

Further than that we waited on ICASA to send us the amended licences and Ms Carol Mhlongo, who had taken over from Ms Veronica Matsane, kindly met with us in person on a few occasions and also communicated with us via email and telephonically whenever we enquired, which was frequently, as to when we could expect to receive our amended licences.

We understand now from your letter that ICASA would like to bring in an amendment to the process whereby Submissions are made. While we appreciate that ICASA may wish to change or amend processes we respectfully cannot believe that such amendment, change or different interpretation should be applied retroactively in our case to our submission which was submitted some two years back and strictly in accordance with the processes in place at that time. To back that up it was indeed the very advice given by our appointed ICASA officer that we relied upon and followed in making the submission that we did.

We were furthermore at all times consultative with ICASA in regard to the advised procedure dutifully and timeously.

We therefore respectfully believe that we fully complied with the criterion for submission at the time of our submission in November 2016 and that this was following the advice of ICASA at the time. Any changes now cannot be applied retroactively to us and kindly request that our licenses be issued accordingly. We would furthermore like to point out that this undue delay has impacted negatively on our business and we respectfully requested that ICASA issue our licences without further delay,

We hope that this is in order, and that you will acknowledge receipt of our correspondence.

Thank you very much.

Yours sincerely Andreas Nel (signed)

## LEGAL PRINCIPLES APPLICABLE

[6] Section 13 of the Electronic Communications Act 2005 as amended on 21 May 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.**
- (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.

....

[7] It is, accordingly, clear that the Authority would have to grant its authorisation for the amendment to the two licences. And this is a power which may not even be delegated to a Councillor or to a committee of the Council – see section 4(4)(f) of the ICASA Act 2000 as amended up to 11 May 2014. The Council itself would, accordingly, have to consider this application.

## FINDING IN THE PRESENT MATTER

[8] A high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*<sup>2</sup> Judge Didcott held as follows:

“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.

Also compare *S v Longdistance Natal Pty Ltd*<sup>3</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

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<sup>2</sup> 1986(4) SA 1135(N); the Standard Terms and Conditions for Individual Electronic Communications as well as Network Services licences 2010 both came into operation on 11 September 2011.

<sup>3</sup> 1990 (2) SA 277 (A).

*“Mens rea<sup>4</sup> in the form of culpa<sup>5</sup> 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.) (accent added)*

According to the Appellate Division of the High Court, finding support in the published articles of South African legal writers, ignorance of the law could be a complete defence.<sup>6</sup> Thus, in *S v De Blom* 1977(3) SA 513(A), Chief Justice Rumpff stated as follows (translated):

Although *mens rea* is not expressly required in regulation 22 of the Exchange Control Regulations in Government Notice R1111, it appears to be clear, if the nature, purpose and scope of the regulations are considered, that the presumption that the State President did not wish to make an innocent illegal act or omission punishable in terms of the regulations cannot be rebutted. In such a case it must be accepted that, when the State has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (i.e. with knowledge of the unlawfulness) committed the act. If the accused wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful; and further, when *culpa* only, and not *dolus* alone, is required as *mens rea*, there is also a reasonable possibility that juridically she could not be blamed, i.e. that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money out (of the country). Should there be, on the evidence as a whole, i.e. including the evidence that the act was committed, a reasonable doubt whether the accused did in fact have *mens rea*, in the sense described above, the State would not have proved its case beyond a reasonable doubt.<sup>7</sup>

[9]The Director appearing for Sybaweb was, with respect, mistaken when he argued that *new* procedures are presently being applied to Sybaweb. Section 13(1) of the Electronic Communications Act 2005, as already amended in 2014 ( a substantial period before Sybaweb’s application) is clear: when the *control* of a licensee is transferred the Act requires that the Council of ICASA must approve it. Council may even find it necessary to hold hearings in this regard. Section

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<sup>4</sup> Translated: “a guilty mind”.

<sup>5</sup> Translated: negligence.

<sup>6</sup> However, see Snyman *Criminal Law* (2002) 185.

<sup>7</sup> *Dolus* = intention; *culpa* = negligence; *mens rea* = a guilty mind

13(1) is explicit in its requirement that before control in a licensee may be transferred the Authority must approve such transfer. It was common cause that the majority shareholding in both licences was transferred before Sybaweb approached the Authority. Notice of the transfer had also been given to the Companies and Intellectual Property Commission (CIPC).<sup>8</sup>

## **CULPABILITY**

[10]What now remains to be decided – and this is the matter before the CCC- is whether the contravention by Sybaweb 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. There might be exceptions where the contravention is of such a nature that it could be contravened on an absolute basis. The CCC has not had a case such as the latter before it. Section 13(1) of the ECA is silent on whether only intentional (that is knowing that there is a contravention) or negligent contraventions (lacking reasonable knowledge) would lead to upholding the complaint. The matter of ownership 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 – so-called *dolo malo* conduct) responsible would go against the clear legislative intention to prohibit a transfer of majority control in a license issued 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 17(1) to include instances where a licensee resolves to shift the control of a license to a new or existing shareholder or co-owner. Ownership or Control is an important facet of licensing within a community with a pre-1994 discriminatory apartheid past such as South Africa.<sup>9</sup> Thus even where a transfer is made to rectify the apartheid past, as would seem to have happened in the present matter, the Authority has a clear interest in what the future of that license would be. Licensing is, indeed, of such an importance that the ICASA Act does not permit the Council of ICASA to delegate

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<sup>8</sup> See section 185 of the Companies Act 2007.

<sup>9</sup> See section 9(2) of the South African Constitution: 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.*

licensing to e.g. a Councillor or a Committee. It has to take this decision as a Council.<sup>10</sup>

The CCC has come to the conclusion that Sybaweb has negligently contravened section 17(1) of the ECA and the complaint against it is, accordingly, upheld. It should have consulted a lawyer in this regard. We repeat what Didcott J<sup>11</sup> held in this regard:

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.

Also compare what Nicholson AJA said in the Appellate Division judgment quoted by Didcott J.

### **RESOLUTION BY THE CCC AS ADVICE TO COUNCIL AS TO AN ORDER**

[11] The CCC does not believe that the imposition of a fine is appropriate in the present case. The licensee was clearly attempting to address inequities of the past by granting control to a company which is in the control of persons previously disadvantaged as intended in section 9(2) of the Constitution of the Republic of South Africa.

The transfer of control, however, amounted to a nullity.

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)<sup>12</sup>

### **ADVICE AS TO AN ORDER BY THE COUNCIL OF ICASA**

[12]The CCC advises the Council of ICASA to take the following Resolution:

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<sup>10</sup> See section 4(4)(f) of the ICASA Act.

<sup>11</sup> See footnote 2 above.

<sup>12</sup> The “not” which was not included by the Legislature is added to make sense of the provision. This is permissible according to Case Law.



1. Find the transfer of a controlling share of Sybaweb to Siyafunda Educational Trust (IT001853/2015) to be a nullity from the outset.

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

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



JCW van Rooyen SC

3 March 2019

Chairperson

The members agreed