

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 10 March 2017

Case number 225/2016

IN RE: TALKWORLD COMMUNICATIONS (Pty) LTD

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

From the Complainant: Mr Gary van Rensburg (Operations Manager); from Compliance (ECS and ECNS): Ms Veronica Matsane; from the Coordinator's Office: Adv L Myeza; Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 8th June 2009 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service Licence

¹ An Independent Administrative Tribunal at ICASA set up 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. The order of Council is enforceable in terms of section 17H (1)(f) of the ICASA Act.

and an Individual Electronic Communications Network Service Licence to Talkworld Communications (Pty) Ltd (“Talkworld”).

THE CHARGE

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter on 20 June 2013 to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that Talkworld had not filed financial statements for the financial year 2009-2010. No reference was made to later years. It appeared at the hearing of this matter that statements for later years – when the company was indeed active, had not been filed. It is a basic principle of administrative procedural justice that no person may be found guilty of a crime or a contravention of an administrative regulation if that contravention was not validly included in the charge sheet. For the Coordinator of the CCC or the CCC itself to add a charge in the matter before it, would be in conflict with the constitutional principle of legality. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another*² 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 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

² [2012] 1 All South Africa Law Reports 49 (SCA).

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)

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

[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 alleged contraventions before the CCC.³ The Constitution of the Republic of South Africa 1996⁴ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁵ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Talkworld. By that time, the 2010

³ Two sets of ICASA Regulations published (Sept) 2011.

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].

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.

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 and licence fees.

[5] Mr van Rensburg (the father-in-law of the Director of the company) who is presently managing the affairs of the licensee, informed the CCC of the particularly extenuating circumstances surrounding this matter. It is sufficient to state that circumstances beyond the control of the company led to the omissions to file financial statements after 2011 - which are, in any case, not before the CCC. We are, nevertheless, satisfied that the affairs of the company are presently being run well by Mr van Rensburg and that the business prospects are positive.

OBSERVATION

[6] At the hearing it was undertaken by Mr Van Rensburg that, with the assistance of a newly appointed Accounting Officer, the company would file outstanding financial statements by the end of 2017. In the particular circumstances of this matter, which are tantamount to impossibility of performance,⁶ this would be reasonable.

MERITS OF THE CHARGE

[7] It is clear from the above that the charge for the omission to file the 2009-2010 financial statement and pay USAF fees, is not upheld. The charge was legally not permissible since the relevant Regulations for that year had been withdrawn in 2011.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members agreed.

25 April 2017

⁶ Compare the incisive analysis of impossibility as a defence by Judge Deon Van Zyl in *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C). In the latter matter the defence was upheld where it had been impossible for a young child to have signed documentation.

