BEFORE THE COMPLAINTS AND COMPLIANCE COMMITTEE

Date of the hearing: 11 March 2013 **CASE No 66/2012**

In the matter between:

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA **COMPLAINANT**

and

VERIMARK (PTY) LTD **RESPONDENT**

MEMBERS OF THE COMPLAINTS AND COMPLIANCE COMMITTEE

JW Tutani	Chairperson
Z Ntukwana	CCC member
N Ntanjana	CCC member
J Tlokana	CCC member
Councillor M Ndhlovu	CCC Council Representative

OTHER PERSONS ATTENDING THE HEARING

Ms K Robinson	Attorney representing Respondent
N Du Plessis	Manager: Verimark

JUDGMENT

[1] The Complainant is the Independent Communications Authority of South Africa ("ICASA"), a juristic person established in terms of section 3 of the Independent Communications Authority of South Africa Act, No 13 of 2000 (the "ICASA Act").

[2] The Respondent is Verimark (PTY) LTD, a company with limited liability, registered and incorporated according to the company laws of the Republic of South Africa.

[3] The Respondent was charged with failure to comply with the Electronic Communications Act (the "ECA") No 36 of 2005 read with Regulations In Respect Of The Labelling of Telecommunications Equipment (the "Regulations") in that it was supplying, selling or offering for sale electronic communications equipment (radio remote controlled cars), using radio frequency spectrum at Mass Discounting Group trading as Makro, Centurion on 11 December 2008 without the necessary labels attached to the equipment or the containers in which the equipment was supplied or offered for sale.

[4] According to the charge sheet, this constitutes a contravention of section 35(1) of the ECA which states that no person may use, supply, sell, offer for sale or lease or hire any type of electronic communications equipment or electronic communications facility, including radio apparatus, used or to be used in connection with the provision of electronic communications, unless such equipment, electronic communications facility or radio apparatus has, subject to subsection (2), been approved by the Authority.

The charge sheet incorrectly links the contravention contained in paragraph 3 above with section 35(1) of the ECA. Paragraph 3 deals with contravention of Regulation 3 which deals with failure to annex

labels on the equipment and containers whereas section 35(1) of the ECA deals with the approval of the equipment by the Authority.

[5] The charge sheet also states that the aforesaid conduct constitutes a contravention of Regulations 3, 4 and 7. The said Regulations read as follows:

[6] Regulation 3(1) provides that all type-approved telecommunication equipment, facility or radio apparatus shall have a legible label permanently affixed to the outside of such equipment, facility or radio apparatus, bearing-

(a) The ICASA logo and

(b) The ICASA-issued licence number.

[7] Regulation 3(2) requires the label to be affixed before the product is made available for sale or lease or is supplied in any other manner.

[8] In terms of Regulation 4, the container, in which the equipment, facility or radio apparatus referred to in regulation 3 is supplied, shall bear a similar label.

[9] Regulation 7 says in the event of a supplier wanting to produce his own label, a sample of the proposed label shall accompany the application for the type-approval of the telecommunication equipment, facility or radio apparatus. This label may only be used if approved by the Authority in writing.

[10] As a result of Respondent's aforesaid contraventions Lekganyane seized the following electronic communications equipment:

One Play Combat Tank – Remote Control Toys.

[11] Ms Robinson acknowledged that Respondent did contravene section 35(1) of the ECA. She confirmed that the goods were seized as alleged in the charge sheet but pointed out that at the time, Respondent was not aware of ICASA procedures, having never marketed the confiscated goods before.

[12] She said "type-approval certificates were issued and when engineering with ICASA officials regarding stickers to be placed on the products, they were advised by the official that they could produce their own labels as long as they complied with the label template." It is not clear what "engineering" means in this context but this how the transcripts reads.

[13] She said they did not understand that the labels had to be approved in writing before being placed on the products.

[14] According to her, they had taken all the necessary steps to ensure that the labels were placed on the product and product packaging and any omission could only be attributed to "human error." Non-compliance was definitely not intentional and she blamed ICASA for giving them incomplete or incorrect advice on the labels.

[15] They only became aware of the problem and transgression in 2008 and, since then, Respondent has taken various steps to ensure that this did not occur again.

[16] Responding to a question from the CCC regarding any educational programme which the Respondent might have undergone, Lekganyane pointed out that ICASA had issued consumer awareness pamphlets in 2002. He said as far as he was aware, Respondent was given this information in 2002.

[17] Du Plessis did not acquit himself as a good and credible witness. He was not only evasive when answering questions, but he could also not remember a number of things. For example, he was unable to provide evidence confirming that ICASA officials had authorised Respondent to produce its own stickers despite being given the opportunity to go through his file.

[18] Du Plessis was the manager responsible for bringing the products into the country but was "personally" not aware of ICASA's requirements for bringing them into the country. He sent an e-mail to one De Waal, an ICASA employee on 28 November 2008, asking him, "How do we obtain ICASA stickers for the products, we need 16 000 stickers." De Waal did not respond to Du Plessis' inquiry.

[19] Mr Du Plessis said "we knew what we knew but it was not enough." Elaborating, he said they knew they had to get some type-approval for the stuff for which stickers were needed. The stickers had to be affixed on the "stuff". However, Respondent did not know how it was done.

[20] Du Plessis' evidence on what follows herein does not make sense and we don't know whether the problem is with the recording. He says they had applied for the type-approval and "got the report done for the tanks we imported from China which did not have the test reports, then we submitted it to Mark de Waal, then we made our own stickers..." He then produced an example of the stickers they had printed in their office.

[21] He said he thought that there were some items which did not have stickers and attributed the omission to one worker who did not "stick a master carton on or something to that effect."

[22] He said when Lekganyane conducted the raid, he told him that he was already liaising with someone on this matter and that he was awaiting his response. However, he could not remember Lekganyane's response due to the fact that this happened in 2009 when he met Lekganyane for the first time.

[23] Lekganyane proceeded to confiscate some of the items that had no labels. Du Plessis ascribed their quality management system's failure to pick up the omission to the busy November/December trading period. He said things were moving in and out and people were working 24 hours a day.

[24] Lekganyane told them that they were in contravention of the law and gave them a detailed breakdown of what they needed to do. Du Plessis said they did not even know what the legal requirements were, what the fines were and "everything to that effect." He said he could not remember clearly but he thought that some product might have had labels but was also confiscated.

[25] Responding to a question as to why he felt compelled to ask for the 16 000 stickers, Du Plessis said he did not know. He did not remember but he thought it "might have been that they told me they are out of label stock, or something like that."

[26] He said recently they had a 1Play Stunt Car and had to wait 6 to 8 weeks for ICASA to give them "label stock to print those labels on there." He said it might have been at that stage because they were eager to "get those tanks into the retail trade for Christmas" and if they had waited, say for 4 weeks for the labels, it would have been past Christmas which would have been a "non-starter."

[27] Lekganyane disputed Du Plessis' evidence that it took 4 weeks for ICASA to get type-approval stickers approved. He said an

applicant produces a sample of the stickers and approval is given immediately the type-approval is given.

[28] Du Plessis said they stopped selling the seized goods in March 2009 because they were not a good seller. If returned, they would either destroy or sell them to staff.

[29] Lekganyane testified that quite a number of goods were seized. He said they had been keeping the goods for a long time because their starting point was to go after the retailer because they did not know if the retailer was the one bringing them into the country. In addition, the retailer had been warned in a couple of instances to follow due process in terms of whoever supplied or "even if they bring out their own equipment."

[30] He also cited a number of activities that prevented them from bringing the complaint to the CCC timeously. These included preparations for the World Cup, litigation, and the unavailability of CCC members.

[31] Lekganyane pointed out that before confiscating the goods, they checked the equipment, called the person in charge of the store and explained the process to him/her. They would then show the person responsible the regulations and would ask him/her to remove the non-compliant goods from the shelf.

[32] If they were the ones bringing the goods into the country, they had to affix specific labels on the product and the container or they would have to call the suppliers to do that before putting them back on the shelf. He said they decided to confiscate the goods because "the same, similar stores have been raided over a couple of years, from 2004." He said he found contravention at Verimark an on-going thing.

[33] A couple of years ago, Verimark was selling the type of a car which did not have labels. Lekganyane did not confiscate the car but warned Respondent to take it off the shelf and try and get the correct labels.

[34] Lekganyane explained the procedure regarding non-labelled equipment. He said when you go to a shop, you are not sure if the equipment is type-approved if it does not have a label. If it did not have a label, it could be illegal equipment that has not been type-approved.

[35] When conducting raids, Lekganyane did not have a person from ICASA's Type-approval Department but had a list of all type-approved equipment.

[36] He explained further that the "type-approved equipment could be a manufacturer and parallel importers all doing the same thing, so each and every equipment irrespective that is the same, whoever brings up similar equipment, and they have been type-approved with lab tests that have been done, they can get different type-approval so that you can distinguish each one from the other." As can be seen, this explanation is not coherent and does not make sense.

[37] When doing the raids, Lekganyane did not ask for the certificate of approval because "they were at a retail store". They always asked for the supplier of the goods who they would call immediately. Sometimes the national buyer would indicate from whom he/she bought the equipment.

[38] Lekganyane's evidence was not coherent sometimes and did not make sense as indicated in paragraph 36. However, when taken in its totality, it is credible. He makes conversions when he has to. He loves his job and would go to the extent of warning Respondent to remove

the goods that were non-compliant from the shelf. He did not immediately confiscate the goods once he discovered that they were non-compliant.

[39] He concedes that Respondent "is trying as much as possible to comply." He goes on to say that they did not wish to penalise everyone for non-compliance but wanted to educate them as well. This is highly commendable and shows fairness on his part.

[40] Contrary to what Du Plessis said, Lekganyane disputed that Respondent never engaged them before the raid. To the extent that Lekganyane's evidence is at odds with Du Plessis', we accept Lekganyane's version as we have found him to be a credible witness.

[41] Du Plessis, on the other hand was a poor witness who appeared not to be taking the hearing seriously. He was not prepared for the hearing. When questions were put to him, he would say he could not remember as this event took place a long time ago.

[42] It is true that this incident took place some time ago but the onus was on him to refamiliarise himself with the events of the day in question by, for example, studying his file which he did only during the hearing. He could have discussed the events of the day in question with his staff to refresh his memory.

[43] He was evasive. When asked, for instance whether he had studied his file in preparation for the hearing, his response was "We don't normally print out everything when we do these kinds of things. The beginning point is getting the product in China." Clearly he was avoiding answering the question.

[44] Du Plessis wanted to escape the responsibility of ensuring that the products and the containers were compliant by saying that he did not know how to comply. He also said he did not even know what

the legal requirements were. Interestingly, when Respondent was served with the charge sheet, it knew exactly where to get assistance, i.e. from its attorneys.

[45] Respondent's legal representative, in her submission reiterated that the person selling the products bore the onus of ensuring that there was compliance. In addition, she submitted that Respondent had to be guided on how to comply. In his testimony, Lekganyane had pointed out that he had advised Respondent on what to do since 2002 and failure to comply was sheer negligence.

[46] Before applying for a search warrant, Lekganyane and his team found the equipment that was non-compliant. They asked Respondent to remove it from the shelves. During the second raid, Lekganyane still found the same equipment in the shelves and it is only then that they decided to apply for a search warrant.

[47] In mitigation, Lekganyane testified that Respondent was helpful and co-operative. We also noted that Du Plessis took the trouble of sending an e-mail to De Waal, enquiring on how to obtain ICASA stickers. Although there is no proof that the e-mail was indeed sent to De Waal, this evidence was not contradicted and we therefore accept it.

[48] We also note that the goods are still being kept by ICASA and Respondent suffered a loss in that it did not have the benefit of selling them. According to Du Plessis, the goods now no longer have value. When they are released back to the Respondent, they will probably destroy or sell them to staff.

[49] Lekganyane proposed that we fine Respondent R50 000 of which R10 000 is payable immediately and that the remaining

R40 000 be suspended for two years. He wanted the R40 000 suspended to ensure that Respondent remained compliant.

Recommendations

[50] In conclusion, we make the following recommendations:

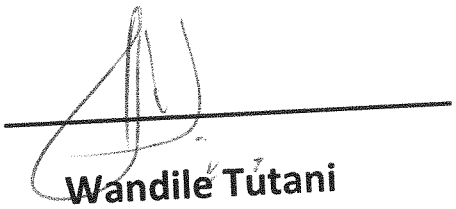
50.1 That a fine of R50 000 be imposed on Respondent with R10 000 payable immediately. The remaining R40 000 be suspended for two years on condition that Respondent is not found to have contravened the ECA and the Regulations during this period.

50.2 As a token of appreciation for Respondent's co-operation and the steps it has taken to ensure that there are no more contraventions, we believe that the recommended fine is reasonable.

50.3 Respondent has suffered a loss due to the seizure of the goods for an inordinately long time – a whopping four years. If the goods had been released after a reasonable time after their seizure, Respondent would probably have been able to sell them and made a reasonable profit.

50.4 Keeping seized goods for a long time kills business and should be avoided at all costs. ICT- related goods become obsolete quickly and should be returned to their owners as soon as possible after seizure.

Councillor M. Ndhlovu, Z. Ntukwana, N. Ntanjana, and J. Tlokana concurred in the above judgment



Wandile Tutani

11 September 2013