

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Meeting: 10 NOVEMBER 2016

CASE NUMBER 174/2016

IN RE: VECTO TRADE 59 (Pty) Ltd t/a COMPUFIN UPINGTON

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

In attendance from the Office of the Coordinator: Adv. L Myeza

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 17th February 2010 Vecto Trade 59 (Pty) Ltd trading as Compufin Upington (“Compufin”) was issued with a Class Electronic Communications

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.

Network Service Licence and a Class Electronic Communications Service Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”), alleging that Compufin had not filed financial statements for the years 2007-2008 and 2008-2009. The latter is not correct, as pointed out in an affidavit by a director of Compufin, Mr Bester. This is so since the licences were only issued on 19 February 2010. The CCC is not permitted to add to the charges before it. 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). Also compare the CCC judgment in *Integrat* (112/2015), where this principle was, inter alia, applied.

[2] While the matter is before the CCC it would, however, be in the interests of justice to deal with the facts so that it would not be necessary to re-instate this case, unless the Compliance Division (ECA and ECNS licences) wishes to obtain an order from Council, which the CCC is not authorised to advise to Council, in the light of the error in the charge before us.

[3] Compufin informed Compliance that they had not become operative in their first licence year 2010-2011. As a result of an oversight, however, the financial statements for 2011-2012 and 2012-2013 were not filed. Steps were immediately taken to rectify this unintentional error and the documentation was filed and the dues paid.

[4] Compufin must, however, be alerted to the fact that a high standard of compliance is expected from a licensee and that future omissions would not be acceptable – especially in the light of the present matter, where there were omissions to file financial statements and pay the necessary dues. In *S v Waglines Pty Ltd and Another*² 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,*

² 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.

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. Compare *S v Longdistance Natal Pty Ltd*³ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Mens rea*⁴ in the form of *culpa*⁵ 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] Thus, had the charge been formulated in relation to the 2011-2012 and 2012-2013 financial years and even if Compufin had paid its fees and rectified the omissions later on, it would nevertheless have been found to have been in contravention of the 2011 Regulations for not having filed the said financial statements timeously and paid its dues. As matters presently stand, the charge was not correctly framed by Compliance and there is no legally permissible manner in which the CCC may add to a charge. 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). The charge also does not include the omission to inform ICASA of non-activity and the CCC may not add it. Ultimately the CCC must act within its powers in accordance with the principles of constitutional legality. Thus, Navsa JA states in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013 (5) SA 24 (SCA) at para [1]:

“Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law. Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.” (Emphasis added, footnote omitted).”

³ 1990 (2) SA 277 (A).

⁴ Translated: “a guilty mind”.


⁵ Translated: negligence.

Also compare Navsa JA's judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

FINDING ON THE MERITS

[6] In the light of the fact that the charge had been framed by ICASA Compliance (ECS and ECNS licences) in relation to the years 2008-2009 and 2009-2010, for which years Vecto Trade 59 (Pty) Ltd t/a Compufin Upington had not been issued with a licence, no finding is made against the licensee.

It is, however, noted that Vecto Trade 59 (Pty) Ltd t/a Compufin Upington conceded that as a result of an oversight it had not filed financial statements for the years 2011-2012 and 2012-2013. Had they been charged with the said omissions, a finding would have been made against the company. After the matter was brought to the company's attention the statements were duly filed and fees paid.



10 November 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding.

