

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

Date of Meeting: 15 September 2017

CASE NUMBER 242/2017

IN RE: WSI SOLUTIONS CC t/a WSI Global t/a WSI NET

**PANEL:** Prof JCW van Rooyen SC  
Councillor Keabetswe Modimoeng  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Mr Jacob Medupe  
Mr Jack Tlokana

In attendance from the Office of the Coordinator: Ms Meera Lalla (Attorney)

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN**

### BACKGROUND

[1] On 26 March 2009 WSI SOLUTIONS CC t/a WSI Global t/a WSI NET (“WSI”) was issued with a Class Electronic Communications Network Service Licence and a Class Electronic Communications Services Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a monitoring function, referred this

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<sup>1</sup> 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. The final judgment is, on application, subject to review by a Court of Law.

matter in June 2013 to the Complaints and Compliance Committee (“CCC”) at ICASA, alleging that WSI had not filed financial statements for the financial years 2011-2012 and 2012-2013, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and, if applicable, no licence fees paid. The licence fees would depend on the amount of the turnover of the licensee, but the amount of USAF fees is as prescribed. The reference to the CCC was part of a large number of cases which were referred to the CCC in June 2013. This created a back-log, which is presently almost addressed.

[2] The relevant Regulations, under which the reference was made, are from 2011.<sup>2</sup> According to the 2011 Regulations, ICASA is empowered to call upon licensees to, for example, file financial statements. This was done in two relevant Government Gazettes. The 2011 and 2012 Gazettes have a bearing on the financial years 2011-2012 and 2012-2013, which are under inquiry by the CCC in this matter. The CCC is not permitted to add later years to the charge before it, even if it emerges during the hearing that financial statements were not filed for later years. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another*.<sup>3</sup> In this matter a charge was added to the charge sheet by an official who was not empowered to do so. The 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 at 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

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<sup>2</sup> USAF = February 2011 and the other two, September 2012.

<sup>3</sup> [2012] 1 All South Africa Law Reports 49 (SCA).

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 in terms of section 17B of the ICASA Act, 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.<sup>4</sup> 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.

## **FINDING**

[3] A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Wag lines Pty Ltd and Another*<sup>5</sup> 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

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<sup>4</sup> *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at para [44]

<sup>5</sup> 1986(4) SA 1135(N).

regime, negligence (*culpa*) would generally suffice for a finding against a licensee. Cf. *S v Long-distance Natal Pty Ltd*<sup>6</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*<sup>7</sup> in the form of *culpa*<sup>8</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. (*C S v De Bloom* 1977 (3) SA 513 (A) at 532G.)

[4] The conclusion is, accordingly, that WSI had omitted to file the 2011-2012 and 2012-2013 financial statements and that it was negligent in not having done so.

#### **ORDER ADVISED TO COUNCIL**

[5] WSI has, after the initiation of these proceedings, complied in so far as the matter before the CCC is concerned. The documentation before the CCC shows that it is also in the process of preparing later documentation as required. It is expected from WSI to ensure that the necessary documentation is, in any case, filed no later than 30 working days after the issue of this judgment.

In the light of the fact that there is no evidence before the CCC that WSI Solutions was *mala fide* in its omission to file and is, in any case, up to date with its duties before the CCC insofar as *this*<sup>9</sup> matter is concerned, it is not necessary for Council to issue more than a desist order in terms of section 17E (2)(a) of the ICASA Act. That sub-paragraph provides as follows:

“The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

(a) direct the licensee to desist from any further contravention;

**It is advised that the order of Council states as follows:**

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<sup>6</sup> 1990 (2) SA 277 (A).

<sup>7</sup> Translated: a guilty mind.

<sup>8</sup> Translated: negligence.

<sup>9</sup> Insofar as later years are concerned, it is clear that the Respondent was, at the stage of this hearing, in the process of, at least, preparing documentation for the later years. These years are, however, not before the CCC.

**WSI Solutions cc t/a WSI Global t/a WSI Net is ordered to desist in future from not filing its financial statements, as duly confirmed and paying its USAF contributions, as prescribed.**

The said order is legally enforceable, should it be breached in future.<sup>10</sup>



14 October 2017

PROF JCW VAN ROOYEN SC

Chairperson

The Members of the CCC agreed with the finding on the merits and the advice to Council in terms of section 17E(2)(a) of the ICASA Act

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<sup>10</sup> See section 17H(1)(f) of the ICASA Act 2000 as amended.

