

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 15 April 2019

Case Number: 300 /2018

REFERRED BY COMPLAINTS AND COMPLIANCE AFFAIRS ICASA

RE: DATABRIDGE NETWORKS cc

COMMITTEE Prof Kobus van Rooyen SC (Chairperson)
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkhulu Malunga
Mr Jacob Medupe
Mr Jack Tlokana

For Complaints and Compliance: Mr. Moyeni Nkosinkulu (CCA) and Mr. Emmanuel Mpenyani (CCA)

For the Respondent: Mr. Pieter Bielderma (Attorney), Mr. Waldemar Heinz, Mr. Darryl Richter and Mr. Gordon Matheson

From the Coordinator's Office: Ms Xola Mantshintshi

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN

INTRODUCTION

[1]The General Manager: Compliance and Consumer Affairs ("CCA") at ICASA referred an alleged contravention by Databridge Networks cc ("Databridge"), a

¹ An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (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 by the Authority 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 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, if any, against the licensee. Council then considers an 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. Such a decision is, on application, subject to review by a Court of Law. Where a complaint is not upheld by the CCC, the finding is also referred to Council.

licensee in terms of the ICASA Act, to the Complaints and Compliance Committee (“CCC”).

[2] The CCA set out facts supporting the charge that Databridge contravened section 13(1) of the ECA by selling and transferring 100% of the close corporation’s interest in its ICASA licences to a Mr Daryll Phiip Richter, without the required prior permission from the Council of ICASA.

[3] Databridge, in its reply to the allegation (which was written by Mr Richter, the purchaser, as mandated by Databridge) conceded that it had been in breach of section 13(1) of the Electronic Communications Act 2005 as amended. The purchaser of the 100%, Mr Richter, explained the background to the transaction. In summary, he stated the following:

On 9 December 2015 I, Mr Richter, purchased all the shares in Databridge from the close corporation partners. This deal was finalised on 8 February 2016. After consulting with an attorney, I realised that [Databridge] was obliged to inform ICASA about the change of ownership. Despite considerable investment in the venture, I elected to dismantle all existing network infrastructure and cease all service provision pending the resolution of this matter. I instructed my attorney to prepare a formal notification to the Authority. The documentation was filed with the Authority on 26 June 2017. In October 2017, I was informed by my attorney that the Authority had suspended the processing of notifications pertaining to changes in ownership and control and was seeking legal opinion on how best to proceed.

I agreed with the approach of the Authority that the transaction amounted to a transfer of control, which would be best dealt with by submission of an application for transfer of control of the licences in question (through submission of Form G, together with related annexures and payment of the Authority’s mandated fee).

Mr Richter then requested the Authority to

- (a) condone and/or disregard the erroneous filing of form O by Databridge on 26 June 2017;
- (b) suspend its referral of the matter to the Complaints and Compliance Committee;
- (c) afford Databridge a reasonable amount of time to finalise negotiations with its potential HDI partner; and
- (d) condone the filing by Databridge of an application for the transfer of control of the licences to him and his HDI partner.

His submission was that, notwithstanding his earlier ignorance of the requirements he, as mandated by the licensee, would submit to ICASA the required application for transfer of the licences. He submitted that this would

be an equitable and expedient course of action, with the added benefit of empowering his future HDI partner. Mr Richter was, he stated, in discussions with an HDI group to acquire a minimum of 30% ownership in Databridge.

Mr Richter was mandated by the two members of the cc to do all that was necessary so as to obtain permission from ICASA to transfer the IECS and IECNS licences to him.

THE ISSUE

[4] In spite of the memoranda from Mr Richter, the problem still lies in the fact that by 26 June 2017 Databridge, in a letter to ICASA, indicated Mr Richter as the holder of the two licences. The letter was confirmed by way of a sworn statement by Mr Richter. There was also a sworn copy of a mandate by Databridge cc to Mr Richter to sign all the relevant documents necessary for the notification and the amendment of the relevant licences. The core problem was, however, that the *transfer* of the licences to Mr Richter had already taken place before 26 June 2017 and without the permission of ICASA having been sought and obtained beforehand. It should be stated that there was no evidence of any bad faith. In fact, Mr Richter, at the hearing of this matter, said that there had clearly been an error and that he was planning, on behalf of licensee, to apply for permission from ICASA, and only when permission is granted he would activate the licences.

LEGISLATION

[5] Section 13(1) and (2) of the Electronic Communications Act 2005 as amended, 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)

From the above it is clear that the sale and transfer of the two licences to Mr Richter was in conflict with section 13 of the ECA and null and void.

FINDING

[6] The CCC is satisfied, after the hearing of the matter and on the facts before it, that a contract had been concluded between Databridge and Mr Richter for the sale of the two licences. Also that there was a transfer of the licences to him. Of course, the transfer was invalid since ICASA had not approved the transfer. The licences, thus, remained in the name of Databridge cc. The other related assets had also been sold to him and the validity of that part of the transaction is not before the CCC and not within its jurisdiction. The problem, however, lies with the sale of the two licences and the transfer thereof. A *licensee* is prohibited from transferring ownership of a licence (in this case an ECS and an ECNS licence) without the *prior* permission of ICASA. As indicated above, it was the *sale* of the licences and the purported *transfer* without permission of ICASA, which amounted to the contravention of section 13 of the ECA. The true respondent is, accordingly, the *Close Corporation* as represented by Mr Richter. Even if the cc has, in the meantime, been deregistered, the responsibility for the contravention of section 13(1) remains with the previous members.² However, it is common cause that Mr Richter has been authorised by the cc to represent it in the application to ICASA for permission to transfer the licences to him.

[7] The defence of Databridge is that its members simply did not know of the requirements of section 13 of the ECA. However, a high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*³ Judge Didcott stated 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*

² See *Mouton v Boland Bank Ltd* 2001(3) SA 877(SCA); Section 26 of the Close Corporations Act provides as follows: (4) The deregistration of a corporation shall not affect any liability of a member of the corporation to the corporation or to any other person, and such liability may be enforced as if the corporation were not deregistered. (5) If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities. 'Deregistration' is defined in s 1 as meaning the cancellation of the registration of the corporation's founding statement.

³ 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.

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*⁴ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*⁵ in the form of *culpa*⁶ 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, also finding support in the published articles of South African legal writers, ignorance of the law could be a complete defence.⁷ Thus, in *S v De Blom*⁸ 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.⁹

⁴ 1990 (2) SA 277 (A).

⁵ Translated: “a guilty mind”.

⁶ Translated: negligence.

⁷ However, see Snyman *Criminal Law* (2002) 185.

⁸ 1977(3) SA 513(A).

⁹ *Dolus* = intention; *culpa* = negligence; *mens rea* = a guilty mind

[8] Databridge, now represented by Mr Richter, conceded in its reply and at the hearing of the charge before the CCC that he and Databridge had been mistaken as to the law and that he should have consulted wider in this field before transferring the shares. Section 13(1) of the Electronic Communications Act 2005 was already amended in 2014 - a substantial period before the contract of sale had been concluded with Mr Richter. Section 13(1) of the ECA is clear: before a license is transferred the Authority must approve the transfer. Council may even find it necessary to hold hearings in this regard. It is clear from the documentation before the CCC that the licences were transferred before Databridge approached the Authority. Section 13(1) of the ECA was, accordingly, contravened by Databridge.

[9] What remains to be decided is whether the contravention by Databridge 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 legally attributable to a licensee, is dependent on whether it had intentionally or negligently not abided by such legislation.¹⁰ This principle was also applied in a similar matter, *Sybaweb*.¹¹ There might be instances in legislation where negligence or intention to contravene are not even required – so-called absolute responsibility. However, the approach of the CCC in regard to section 13 has been that intention or negligence is required before a contravention is found. The matter of ownership and control 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 the transfer¹² of a license issued by ICASA, without prior permission 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.

[10] Licensing is, indeed, of such an importance that the ICASA Act does not permit the Council of ICASA to delegate licensing to e.g. a Councillor or a Committee. It has to take this decision as a Council.¹³ The matter is, thus, clearly of public importance. The question is whether a reasonable licensee would have

¹⁰ According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention)

¹¹ See *Sybaweb*, case 305/2019

¹² Section 13 also prohibits the transfer of control within a company. The present matter, however, relates to the first part of section 13, which prohibits the transfer of the licence as such.

¹³ See section 4(4)(f) of the ICASA Act.

not taken more care about what the Act required than the members of Databridge. The CCC believes that such care should have been taken. To be a licensee leads to a high degree of responsibility. Licensees operate within the public sphere, which is a regulated one. The CCC has come to the conclusion that Databridge has negligently contravened section 13(1) of the ECA and the complaint against it is, accordingly, upheld. It should have realised that it could not simply sell and transfer its licences without prior approval of ICASA. The licenses clearly state to whom ICASA has issued the two licences. It should be obvious for anyone within the trade that *more* than a mere notice to ICASA was necessary to, in effect, sell and transfer the licences.

The CCC, accordingly, finds that Databridge was in violation of section 13 of the ECA and negligently so.

ADVICE TO COUNCIL

[11] The CCC has found that Databridge has transferred its licenses to Mr Richter in conflict with section 13(1) of the ECA and that it had acted negligently by not first approaching ICASA for approval of the sale of the licences.

The CCC does not believe that the imposition of a fine is appropriate in the present case. There was no intention to contravene and Mr Richter, to whom the licences were sold, has consistently, in the documentation before the CCC and during the hearing indicated that he realises that the licensee had not abided by the legislation. He, in fact, has stored all the equipment until the outcome of this matter before the CCC and ultimately, the Council of ICASA.

Section 17E(2)(c) 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)¹⁴

[12]The CCC advises the Council of ICASA to issue the following Order in terms of section 17E(2)(c) of the ICASA Act:

1. **Declare**, in terms of section 17E(2)(c) of the ICASA Act, **the contract** dated 9 December 2015 between Databridge Networks cc and Mr Daryl Philip

¹⁴ The “not” which was not included by the Legislature is added to make sense of the provision. This is permissible according to the Supreme Court.

Richter **to transfer** the two licences (0337/IECNS/Mar/09 and 0337/IECS/MAR/09 **to Mr Richter**

(a) to amount to a contravention of section 13(1) of the Electronic Communications Act 2005 and

(b) as null and void *insofar as it relates to the transfer of these two licences to the said Mr Richter.*

2. **Direct** Databridge Networks CC to do the following:

(a) Apply to ICASA for permission to transfer the above mentioned licences to Mr Daryl Philip Richter;

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



JCW van Rooyen SC

The Members agreed

1 May 2019