

COMPLAINTS AND COMPLIANCE COMMITTEE¹

DATE OF HEARING: 25/2/2019

CASE NO: 303/2018

IN RE: LINKINC (PTY) LTD

TRIBUNAL Prof JCW van Rooyen SC
 Dr Keabetswe Modimoeng (ICASA Councillor)
 Mr Peter Hlapolosa
 Mr Mzimkulu Malunga
 Mr Jacob Medupe
 Prof Kasturi Moodaliyar
 Mr Jack Tlokana

From Compliance and Consumer Affairs ICASA: Ms C Mhlongo and Ms K Setshedi

For the Respondent: Ms Candice Schultz and Mr Sean Dikgale of Schultz Inc

CCC Assessor: Ms Xola Mantshintshi

CCC Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] The General Manager: Compliance and Consumer Affairs at the Independent Communications Authority of South Africa (“ICASA”), who has a delegated monitoring function in terms of the ICASA Act 13 of 2000, as amended, referred a matter concerning Linkinc Telecommunications (Pty) Ltd (“Linkinc”), a licensee

¹ An Independent Administrative Tribunal (recognised as a s 33 of the Constitution of the RSA Tribunal by the Constitutional Court) at the Independent Communications Authority of SA (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 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 or references from within ICASA which it receives against licensees 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 against the licensee. Council then considers the 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. Decisions are subject to Review by the High Court.

in terms of the said Act, to the Complaints and Compliance Committee (“CCC”) at ICASA. The Reference is based on the allegation of non-compliance with section 13(1) of the Electronic Communications Act 2005 (“ECA”), as amended in May 2014. Linkinc has two licences (an IECNS and an IECS) issued to it on 15 January 2009 and updated on 27 June 2017.

THE ISSUE

[2] At the core of the Reference to the CCC lies the issue whether Linkinc has contravened section 13(1) and (2) of the Electronic Communications Act 2005 as amended.

[3] It was common cause that the shareholders in Linkinc sold 100% of their shares in Linkinc to Mr Fayzel Kader Hoosen from *Hitec Sure*, effective from 1 September 2017. Thereafter it informed ICASA of the change of control in the Company. An ICASA form “O” was filed for this purpose, dated 12 September 2017.

[4] The Acting General Manager: Compliance and Consumer Affairs, in a letter dated 20 March 2018, informed Linkinc as follows:

The submission of change of ownership by Linkinc (Pty) Ltd (with) date 13 September 2017 refers.

1. After consideration of all relevant factors, the Authority has arrived at a conclusion that the transaction concluded, amounts to a transfer of control. The Authority has reached this conclusion on the basis that Hitec Sure has now acquired control of 100% shareholding effective from 31 August 2017 from Linkinc Telecommunications (Pty) Ltd licences (ECS and ECNS), whereas in the past it did not have control.
2. In terms of section 13(1) of the Electronic Communications Act 2005, Linkinc was required to obtain “prior written permission” of the Authority before transferring the control of its ECS and ECNS licences. Consequently, the Authority is of the view that Linkinc has contravened section 13(1) of the ECA.
3. In the Authority’s view, a contravention of section 13(1) of the ECA has occurred and therefore, the Authority is legally bound to refer the matter to the Complaints and Compliance Committee for adjudication.
4. However, section 3 of the Promotion of Administrative Justice Act (2000) deals with procedurally fair administrative action, including the right to afford a person affected by administrative action, a reasonable opportunity to make representations. Therefore Linkinc is hereby required to provide the Authority with reasons, within ten working days of receipt of this correspondence, as to why it should not be taken to the CCC for contravention of section 13(1) of the ECA.

[5] Linkinc, on the 23rd March 2018, responded and stated that the omission to obtain prior permission from the Authority had been an innocent omission. There was no malice on its part. It has been involved in the telecommunications industry for 17 years and it would not wilfully contravene any Act or Regulation. It was not aware of this provision in the ECA. It had been advised by the Authority to fill in form “O”. It would have been helpful had the Authority advised them to apply for permission to transfer control. In conclusion, it was an honest oversight. The Authority was respectfully requested to waive the necessity for authorisation in terms of section 13(2).

LEGAL PRINCIPLES APPLICABLE

[6] Section 13 of the Electronic Communications Act 2005 as amended on 21 May 2014 provides 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.

[7] It is clear from the above that the Authority would have to grant its authorisation for the amendment to the two licences. And this is a function which may not even be delegated to a Councillor or to a committee of the Council – see section 4(4)(f) of the ICASA Act 2000 as amended in May 2014. The Council itself would, accordingly, have to consider this application. The Authority is not authorised to grant condonation. Parliament has decided to amend the legislation and the legislation must be abided by. Thus: an application must be filed afresh for permission to transfer control.

FINDING IN THE PRESENT MATTER

[8] A high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*² Judge Didcott (later a Justice of the first Constitutional Court) held as follows:

² 1986(4) SA 1135(N).

Ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The ignorance or mistake must be both genuine and material and, where culpa serves as *mens rea*, the ignorance or mistake has to be reasonable as well. Where the unlawful act can be committed through culpa, the question is whether the person should reasonably have realised that what he was doing or was about to do might well be unlawful. 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.

The fact that the person concerned has obtained advice on the lawfulness or otherwise of a proposed course of action from a source ostensibly qualified to furnish such advice and has received the assurance that what he proposes is lawful will not always amount to a satisfactory performance of his duty to investigate. Whether it is reasonable to trust the legal advice given, whether the unlawful conduct which it leads to is also excused by it, depends entirely upon the circumstances of the case. An important consideration is the type of person whose behaviour is in issue. For instance, a reasonable man, of average intelligence and sophistication, is aware that lawyers and Judges differ in their views on the same issues. It would not make sense for such a man to take for granted the correctness of all legal advice he happens to receive. A further consideration is the urgency or otherwise of the need for advice. The pressure or lack of it must be weighed against other features of the case. For example the potential gravity of the consequences of acting on incorrect advice. Yet a further consideration is the intrinsic character of the problem for which advice is sought. How hard the layman will find it to tell bad advice from good, or how natural it will be for him to trust whatever advice he is given, will depend on the complexity of the problem itself and the complexity of the legal reasoning it calls for.

Also 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.) (accent added)

³ 1990 (2) SA 277 (A).

⁴ Translated: "a guilty mind".

⁵ Translated: negligence.

According to the Appellate Division of the High Court ignorance of the law could be a complete defence.⁶ Thus, in *S v De Blom* 1977(3) SA 513(A), Chief Justice Rumpff stated as follows (translated from Afrikaans):

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.⁷

CULPABILITY

[9]What now remains to be decided – and this is the matter before the CCC- is whether the contravention by Linkinc 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 attributable to a licensee is dependent on whether it had intentionally or negligently not abided by such legislation. There might be exceptions where a legislative offence is of such a nature that it could be contravened on an absolute basis. The CCC has, however, not had such a case before it. Intention or negligence has consistently been required for a contravention. Section 13(1) of the ECA is silent on whether only an intentional (that is realising that a contravention is being committed) or also negligent (lacking reasonable foresight) would lead to upholding a complaint. 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

⁶ However, see Snyman *Criminal Law* (2002) 185.

⁷ *Dolus* = intention; *culpa* = negligence; *mens rea* = a guilty mind

includes the foresight of unlawfulness – so-called *dolo malo* conduct) responsible would go against the clear legislative intention to prohibit a transfer of majority control in a license issued by ICASA, without the prior approval of Council. 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. It must be accepted that Parliament amended section 13(1) to include instances where a licensee resolves to shift the control of a license to a new or existing shareholder or co-owner. Ownership or Control is an important facet of licensing. 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.⁸

The CCC has come to the conclusion that Linkinc has negligently contravened section 13(1) of the ECA and the complaint against it is, accordingly, upheld. It should have consulted a lawyer in this regard. We repeat what Didcott J⁹ held in this regard:

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 regime, negligence (*culpa*) would generally suffice for a finding against a licensee.

Also compare what Nicholson AJA said in the *Longdistance* judgment quoted above.

RESOLUTION BY THE CCC ON ADVICE TO COUNCIL AS TO AN ORDER

[10] The CCC does not believe that the imposition of a fine is appropriate in the present case. The licensee has a clean record and has apologized for the error.

The transfer of control, however, amounted to a nullity.

Section 17E(2) 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 -

⁸ See section 4(4)(f) of the ICASA Act.

⁹ See footnote 2 above.

- (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)¹⁰

ADVICE AS TO AN ORDER BY THE COUNCIL OF ICASA

[11]The CCC advises the Council of ICASA to consider taking the following Resolution:

1. Find the transfer of a controlling share in Linkinc to be a nullity from the outset.
2. Direct Linkinc to do the following:
 - (a)Immediately cancel the registration (if this was done) following upon the transfer of control with the Companies and Intellectual Property Commission and copy ICASA with such cancellation *and* the de-registration thereof with the CIPC;
 - (b)Re-apply to ICASA for the transfer of control if Linkinc again resolves to do so; and
 - (c)Await the resolution of the Council of ICASA in this connection.



JCW van Rooyen SC

10/5/ 2019

Chairperson

The members agreed

¹⁰ The “not” which was not included by the Legislature is added to make sense of the provision. This is permissible according to Case Law.