COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date heard: 21 October 2019 CASE NR: 352/2019

REALTIME COMMUNICATIONS (PTY) LTD Complainant

vs

AVOXI (PTY) LTD Respondent

TRIBUNAL Prof JCW van Rooyen SC (Chairperson)
Councillor Nomonde Gongxeka-Seopa
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Mr Jack Tlokana

On behalf of the Complainant: Mr Phumlani Gouws and Mr Richard Mashimbye

On behalf of Avoxi (Pty) Ltd: Mr Anton Kotze and Ms Marinda Pretorius

Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Meera Lalla.

JUDGMENT

JCW van Rooyen

[1] A complaint against Avoxi (Pty) Ltd was received from Realtime Communications (Pty) Ltd ("Realtime"). Both are electronic licensees under the jurisdiction of the Independent Communications Authority of South Africa ("ICASA").

The Complaint reads as follows:

COMPLAINT IN TERMS OF NUMBERING PLAN REGULATIONS, No 39861, GOVERNMENT

[1] The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments: are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division 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 an order 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.

GAZETTE, 24 MARCH 2016, GOVERNMENT NOTICES No. 370, 24th MARCH 2016

- Section 6 [CONDITIONS OF USE OF AN ALLOCATION OF THE NUMBERING RESOURCE]

  Subsection (3) [The following general conditions relating to the use and management of the assignment of number apply to all allocations made by the Authority:

  - ✓ Paragraph (b) [the allocation must be controlled by the licensee to whom the Authority has made the allocation to;
  - ✓ Paragraph (f) [a licensee shall not make use of numbers that have not been allocated to them or which the Authority has not authorised them to use;

I hereby lodge a complaint on behalf of Realtime Communications (Pty) Ltd, formerly called Meridict Systems CC, or "Meridict", who is also a licensee of the regulator (ICASA). Realtime Communications (Pty) Ltd is hereinafter also simply referred to as "Realtime".
Realtime has a non-geographic and geographic telephone number range assigned to it by ICASA. In order to make operational its own telephone number range through implementation of VoIP telephony solutions, Realtime sought to work with a business partner who already has the enabling software and hardware technology platform for providing VoIP services. This approach would then enable Realtime to provide VoIP telephony services to its own customers, while paying a fee for using the enabling technology platform.

a) Realtime signed up as a wholesaler with Avoxi (Pty) Ltd in 2014, in order to enable Realtime to re-sell value added Avoxi products such as Call/Contact Centre, tele-conference etc.

b) The arrangement would make it possible for Realtime to make the business model operational and enable Realtime to use its own telephone number range, on top of the VoIP technology platform that belongs to Avoxi (Pty) Ltd.

c) The arrangement meant that the telephone number range of Realtime would have to terminate through the Avoxi technology platform.

d) On the dates of 4 August and 11 December 2014, Realtime gave permission for its non-geographic and geographic telephone number range respectively, to terminate through Avoxi technology platform. (Please refer to supporting correspondence attached herewith).

e) During the course of 2014, I received requests by telephone from the technical staff of Avoxi, on the use of my telephone number range for allocating customers to Avoxi. I did not accede nor agree to these requests

f) Realtime was given an account number as well as registered on the internet based online system of Avoxi and was able to view the status of its own telephone number range, as it is allocated to customers.

g) In the same year (2014) Avoxi informed me that my company Realtime's account was

cancelled and closed in their billing system due to an invoice not paid by me for the stated fee. This meant that Realtime no longer had access to the Avoxi online technology platform or system.

h) In the year 2017 I approached Avoxi again and signed a reseller's agreement for a monthly R1 500.00 fee. Realtime's account was promptly closed again by Avoxi with reason given, being due to non-payment of stated monthly fee. Realtime no longer had access to the VoIP technology platform of Avoxi. This meant that only Avoxi could continue to unscrupulously control the number allocation of Realtime if they wanted to.

i) In June 2019 I started with arrangements for porting of my company Realtime telephone number range through the NPC (Number Porting Company). Very soon thereafter in early July 2019, I received telephone calls from Avoxi technical staff (Wikus Pretorius) requesting me to allow for my geographic telephone number range to be ported to Avoxi.

j) Prior to the telephone call, it had not occurred to me that Avoxi was holding onto my telephone number range and were using it for allocating to their customers. I had it taken for granted that my company telephone number range would be out of bounds to Avoxi since Avoxi informed me of their "cancellation of my company, Realtime's account and closure of the account on their billing system".

k) As a result of the new information that had now come to light, I then saw it necessary that I should state and revoke in writing the permission of the year 2014, which I granted for my telephone number range to terminate through the Avoxi platform. This cancellation of permission is contained in my letter of 5 July 2019 that was written to Avoxi.

l) Very soon thereafter on the same day of sending the email, I received a telephone call from a staff member (Wendy Mokhachane) of Avoxi. She requested me to allow time in order for her to consult with her manager in Avoxi.

m) The week thereafter I received a telephone call from a manager (Marinda Pretorius) at Avoxi. Marinda Pretorius and I had some discussions over the telephone as well as some email exchanges between us. She revealed to me that she is aware of 27 numbers from the Realtime telephone number range that are in use by Avoxi customers. In one of the emails she revealed and provided to me the actual 27 numbers as a list.

n) In my attempts to settle and resolve the dispute amicably, I sent an email to Marinda Pretorius on 11 July 2019 with a proposal for resolution of the matter. After some further email exchanges between us, Marinda indicated that she must also consult with a senior manager in Avoxi.

o) I have since neither received nor heard anything from Avoxi and I think that this is purposeful.

p) I believe that Avoxi has perpetuated this act since 2014 and now believe that they can still continue to do so with impunity. Their cancellation and closure of my account on their billing system was a simple act of convenience for Avoxi, since their keeping me out of

their technology platform and systems would make me no wiser on their use of Realtime's number allocation, so that Avoxi may continue to control Realtime's number allocation without any hindrance.

q) At no stage not in 2014, or in 2017 or at any other stage was the number allocation "traded" nor sold to Avoxi by Realtime. Avoxi staff gained knowledge of the number allocation of Realtime through an exercise intended for Realtime to use the Avoxi VoIP technology platform.

r) Avoxi abused a position of trust for their own financial gain as well as for unjust profit by unduly and surreptitiously appropriating for themselves the control over and the use of number allocation of Realtime for Avoxi's own customers as if the number allocation was their own.

s) Avoxi gained control on the use of the number allocation of Realtime by stealth and not by permission or agreement.

t) Avoxi is not the licensee to whom the Authority has made the telephone number allocation to.

1) Avoxi acted in breach of the Numbering Plan Regulations, Nr 370 of 24 March 2016, Section 6(3)(b) as well as (f).

2) Therefore I believe that Avoxi is in contravention and is liable according to Section 25 [CONTRAVENTION AND PENALTIES] of the regulations [NUMBERING PLAN REGULATIONS No 370 dated 24 March 2016]

My plea or request is for the CCC to:

i) Facilitate mediation of a settlement between Realtime and Avoxi as parties to this complaint/dispute through the process of pre-hearing conference; or alternatively

ii) Refer the matter for hearing by the ICASA CCC Tribunal.

Please revert to the undersigned in the event of any further enquiries.

Signed: Phumlani FM Gouws (Mr) and by a representative of AVOXI

[2] The licence which was issued in 2009 to RealTime Communications (Pty) Ltd for the Provision of Electronic Communications provides, inter alia, as follows: (Shortened)

SCHEDULE

1. **Trading Name**

RealTime Communications (Pty) Ltd

2. **Geographic Coverage**

The Licensee shall provide national coverage of its electronic communications services.

3. **Range of numbers from National Numbering Plan**

The Licensee shall retain a right to apply for numbers subject to the number plan and related regulations issued in terms of section 68 of the EC Act.

4. **Rights and obligations**

4.1 The Licensee is entitled to provide electronic communications services in the Republic.

4.2 The rights and obligations under this licence may be exercised or performed by a third party, including its agents and contractors. The Licensee shall be responsible for the acts or omissions thereof on the basis that:-

4.2.1 the liability of the Licensee for any acts or omissions of such third party, including agents or contractors, in relation to the exercise of such rights shall be limited to acts or omissions which constitute a contravention of the conditions of this Licence;

4.2.2 the Licensee shall stipulate adequate provisions in its contracts with such third party, including agents or contractors, to ensure that their exercise of any of the above rights do not contravene any of the conditions of this Licence;

4.2.3 should any such third party, including agents or contractors, commit any act or omission in contravention of a condition of this Licence, the Licensee shall, upon becoming aware thereof, act as expeditiously as is reasonably possible to remedy such contravention and for this purpose the Licensee shall be afforded reasonable time; and

4.2.4 The Authority shall, upon becoming aware of any contravention of this Licence by such third party, including the Licensee's agents or contractors or any complaints lodged with the Authority in relation thereto, forthwith in writing notify the Licensee accordingly.

4.3 The Licensee and any or all of its Subsidiaries shall be entitled by virtue of this Licence to provide all or any of the Services together with all or any other rights granted to it under this Licence.

4.4 Nothing in this Licence shall be construed or understood as to relieve the Licensee or any other party of the obligations to comply with any other applicable statutory prohibition or obligation.

5. **Force Majeure**

> The Licensee shall not be held liable for its inability to perform its obligations in this licence and other regulations due to unforeseen natural causes. However, the Licensee shall advise the Authority as soon as practicable after becoming aware of the existence of any such event or circumstances likely to lead to such event.

[3] After the Complaint was received, the Coordinator of the CCC sent the following letter to AVOXI (Only the relevant part of the letter is quoted):

Re: **REALTIME COMMUNICATIONS (PTY) LTD ("REALTIME") vs AVOXI (PTY) LTD ("AVOXI")**

The above matter refers.

1. We advise that on 22 July 2019 Realtime Communications (Pty) Ltd ("Realtime") referred the aforesaid matte for investigation by the CCC in terms of Section 17B(a) of the ICASA Act.

2. Realtime alleges that Avoxi (Pty) Ltd ("Avoxi") has contravened the following 2016 Numbering Plan Regulations:

   1.1 "Conditions of Use of an Allocation of the Numbering Resource:-

   Regulation 6:- "The following general conditions relating to the use and management of the assignment of number apply to all allocations made by the Authority:

   Regulation 6(3)(b):- "the allocation must be controlled by the licensee to whom the Authority has made the allocation to;"

   Regulation 6(3)(f):- "a licensee shall not make use of numbers that have not been allocated to them or which the Authority has not authorised them to use."

3. Please note that the aforementioned allegations of contravention by the complainant are fully canvassed in the complaint and annexures attached hereto marked "A" for your kind attention.

4. In terms of Regulation 4(1) of the Regulations Governing Aspects of the Procedures of the CCC of the ICASA, we request that you respond to the complainant's allegations in writing by delivering a detailed response to the

attached complaint and any supporting evidence to our offices (copying the complainant) within 15 (fifteen) days of receipt hereof, being Wednesday, 14 August 2019.

RESPONSE BY AVOXI

[4] Avoxi responded by stating the following in a letter to the CCC Coordinator:

On 24 July 2019, Avoxi (Pty) Ltd (AVOXI) was made aware of a previous customer's complaint made to the CCC. Realtime Communications (Pty) Ltd (REALTIME) was the party that submitted the claim. Please be informed that Avoxi has settled this matter directly with Realtime outside of the need to get the CCC to mediate a solution originally requested by Realtime. As we understand it through the settlement process, Realtime either has or will formally be withdrawing the complaint by 14 August 2019.

Avoxi does refute Realtime's allegations made in the complaint that its actions were done with malicious intent and for its own gain. Evidence can be provided, if necessary, such as email evidence, that Realtime was in fact notified of suspension of services for non-payment. Regardless, Avoxi does acknowledge that through human error, 27 of its numbers were used out of the 3 000 that were loaded onto the Avoxi network. (For the avoidance of doubt, the 3 000 numbers are still on the Avoxi network and have been since 2014 since Realtime has not removed them. And no attempt has been made by Realtime to remove these numbers from the Avoxi network for five years until 5 July 2019 after Avoxi had reached out to Realtime alerting them of an issue with one of the numbers. Ultimately nothing was being done with these numbers.)

In an act of good faith, Avoxi has settled the matter with Realtime by covering its stated legal costs and reimbursing it the revenue Avoxi derived from the use of these numbers. It should be noted that Realtime has not been precluded from any economic gain as it relates to these numbers. As the 27 numbers in question cannot be ported by end-users since Realtime is not currently set up with the Number Portability yet,. Realtime has agreed to allow Avoxi the use of these numbers until such time as these numbers can officially be ported.

Again, Avoxi refutes the allegations made and especially that it maliciously "abused its position of trust for its own financial gain". Avoxi requests that this matter be formally closed.
Signed: Weston Edmunds: Executive Vice President.

[5] The settlement agreement, which was signed by both parties, was attached and reads as follows:

MUTUALLY AGREED SETTLEMENT AGREEMENT
Entered into by and between
AVOXI (PTY) LTD
Hereinafter referred to as "AVOXI"
And
REALTIME COMMUNICATIONS (PTY) LTD
Hereinafter referred to as "REALTIME"
Together, "The Parties"

Now therefore the Parties agree to the following:

1. Avoxi agrees to pay Realtime and Realtime agrees to accept the amount of R104,720, hereinafter referred to as "the Settlement Amount" as full and final settlement for any and all claims that Realtime may have against Avoxi for the use of 27 of its South African non–geographic and geographic numbers. This amount is arrived at by the fact that Realtime states that it does not want to "Make money" off of this matter but wants to cover its legal expenses. To that end, Realtime states that it has paid R95, 000 to its legal representative's trust account. The balance is based on a rate of R15.00 multiplied by 27 numbers times 24 months.

2. This is a full and final settlement agreement and both parties hereby agree to waive their rights towards any claims and/or disputes between themselves which may have arisen, which may arise now or may arise in the future as a result of this agreement. Relatedly, Realtime hereby agrees to withdraw and close the claim it has made to the Complaints and Compliance Committee ("CCC") under the Independent Communications Authority under case number 352/2019. Realtime also acknowledges and accepts the fact that the use of these numbers by Avoxi was not malicious in nature and did not preclude or harm Realtime in any way from any economic gain through the use of its numbers. Realtime agrees to allow the 27 numbers in question to be ported when Realtime is set up with Number Portability and agrees to allow Avoxi's customers to continue to utilise the numbers until such time.

3. Avoxi agrees to pay the Settlement Amount into Realtime's nominated bank account within 24 (twenty-four) hours of this agreement being signed by the Parties. If this agreement is effectuated on a weekend or a holiday, the payment will be made on the subsequent business day. This, of course, contingent on Realtime providing its nominated bank account to Avoxi at the time of its signing of this agreement.

4. With the payment of the Settlement Amount, Realtime will email the CCC, notifying them that the matter relating to case 352/2019 has been resolved and that Realtime withdraws its claim and requests that the case be closed with immediate effect. Realtime will copy Avoxi personnel with whom Realtime has been liaising concerning case 352/2019. As per the CCC's guidance, the Parties will submit this settlement agreement to the CCC.

5. This agreement is the full agreement between the Parties. No deviation from the provisions hereof, or latitude in respect of time frames contained herein, shall be deemed to constitute a tacit agreement, and neither shall any amendment to this agreement be of any force or effect unless reduced to writing and signed by the parties hereto.

6. In witness whereof the Parties hereto have caused this agreement to be executed by the duly authorised representatives.

REFERENCE TO THE CCC

[6] Whilst the CCC has appreciation for the agreement, the legal question is whether a contravention of the relevant legislation may be condoned by the CCC and, ultimately, by the Council of ICASA. In terms of section 17(6) of the ICASA Act the Chairperson of a Committee must decide when to call a meeting of the Committee. In the exercise of this discretion, in this matter, the following statement by Malan J is instructive:[2]

> [30] An exercise of a power would not be lawful if the functionary misconstrues the purpose of a statute and as a result errs on the jurisdictional facts to be taken into account when exercising a discretionary power….Clause 1.16 required the first respondent [the Acting Chairperson of the BMCC] to determine whether the complaint merited a formal hearing. The purpose of the power is to determine whether the seriousness of the allegations and the complexity of the issues that arise and, in particular, the dictates of procedural fairness, require a formal hearing to be convened. While the substance of the complaint is not irrelevant it is not the only factor to consider when the power conferred by clause 1.16 is exercised. Where the complaint is not frivolous or vexatious as envisaged by para 1.6 a request for a formal hearing may not be refused simply on the basis that the complaint has *no substance*. Additional factors, such as the *seriousness* of the complaint, the nature of the issues raised and *complexity* of the legal and factual issues, the question whether the parties are willing and able to present evidence and whether the complainant requested a formal hearing, should be considered in the exercise of this power. The first respondent did not have regard to any of these factors. Instead, he first decided that

[2] *SA Jewish Board of Deputies v Sutherland NO & Others* 2004(4) SA 368(W).

there was no 'merit' in the complaint, on an incorrect understanding of the Constitutional Court's judgment, and then concluded that there was no sound reason for holding a formal hearing. (Emphasis added)

[7] In the exercise of this discretion I decided to refer the matter to the CCC on the basis that it was undisputed that *Avoxi* had made use of the numbers referred to without the permission of *Realtime* and that this conduct, on the face of it, amounted to a contravention of the relevant Regulations. The CCC was seized with the matter and the withdrawal of the Complaint was no longer in the discretion of the Complainant, despite the agreement.

THE MERITS

[8] The licence, issued by ICASA, reads as follows in paragraph 3.2:

The rights and obligations under this licence may be exercised or performed by a third party, including its agents or contractors. The licensee shall be responsible for the acts or omissions in respect thereof on the basis that-
3.2.1 the liability of the licensee for any acts or omissions of such third party, including agents or contractors,in relation to the exercise of such rights shall be limited to acts or omissions which constitute a contravention of the conditions of this Licence;
3.2.2 the Licensee shall stipulate adequate provisions in its contracts with such third party, including agents or contractors, to ensure that their exercise of any of the above rights do noty contravene any of the conditions of this Licence…

[9] It is common cause that *Realtime* did not grant permission to *Avoxi* to use the numbers referred to earlier. *Avoxi* is now prepared to pay *Realtime* for the use of the numbers subject to the condition that the complaint with the CCC is withdrawn. This condition was included in the unsigned contract as well as the signed contract. It is not a condition which binds the CCC even if a settlement is foreseen in section 17E of the ICASA Act. There is no way in which a licensee may settle itself out of a contravention. The Regulations subject to which numbers may be used are regulated and not open to settlement. Orderly management of numbers is in the public interest and not open to negotiations and a settlement before the CCC or the ICASA Council.

[10] Although there is no evidence (direct or by implication) that Avoxi intentionally used these numbers knowing that it was using the numbers without permission, the question is whether it had not been negligent. Should it not, as a reasonable trader, have realised that it was using numbers not issued to it or made available to it, in terms of its licence, as quoted above, by Realtime?

Or could it even, possibly, have amounted to gross negligence?

In *Stella Tingas, MV: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2003 (2) SA 473 (SCA) Judge of Appeal Scott stated as follows in regard to what gross negligence means: I shall assume, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143C) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl's* case supra at 557A - E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (*Van Zyl's* case supra at 559D - H). It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. The Roman notion of *culpa lata* included both extreme negligence and what today we would call recklessness in the narrow sense or *dolus eventualis*. (See Thomas *Textbook of Roman Law* at 250.) As to the former, with which we are presently concerned, Ulpian's definition, D50.16.213.2, is helpful: *'culpa lata* is extreme negligence, that is not to realise what everyone realises' (*culpa lata est nimia neglegentia, id est non intellegere quod omnes intellegunt*). Commenting on this definition, Lee in *The Elements of Roman Law* 4th ed at 288 describes gross negligence as being 'a degree of negligence which indicates a complete obtuseness of mind and conduct'. Buckland in *A Textbook of Roman Law* 3rd ed at 556 suggests that what is contemplated is a 'failure to show any reasonable care'. Dicta in modern judgments, although sometimes more appropriate in respect of *dolus* eventualis, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); 'a total disregard of duty' (*Rosenthal v Marks* 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (*S v Smith en Andere* 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D). It follows, I think,

that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the in fact reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

[11]Thus, the question before the CCC is not whether the regulations were contravened, since that was common cause, but whether it took place negligently. If not, the finding will go in favour of *Avoxi:* a mere contravention without negligence or knowledge that it was contravening the Law is exceptional and would not apply to the Regulations in the light of the high fine that may be imposed. There must, accordingly, be either intention or negligence before a finding may be made against Avoxi.It is accepted that the contravention was not intentional. Gross negligence or negligence will however be considererd in the light of High Court authority in this regard.
In *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E the test for negligence was stated as follows by the Appellate Division:
'For the purposes of liability *culpa* arises if -

(a) a *diligens paterfamilias* in the position of the defendant -
  (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  (ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps. J

. . . Whether a *diligens paterfamilias* in the position of the person concerned would take any steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down.'

[12] The test is thus whether a reasonable provider under the same circumstances would not have made the same error. The use of numbers is an activity which must either be licensed by ICASA or made use of with the permission of the person to whom the numbers were made available by ICASA – see the license for the latter possibility. The numbers were not used with the permission of the licensee and the relevant Regulation was contravened. Given the importance of numbers, the CCC's conclusion is that the error amounted to gross negligence. Numbers, within this specific trade, are crucial. To simply use numbers without doing a proper check amounts to a gross error.

[13] The Numbering Plan Regulations 2016 provides for a substantial fine. Regulation 25 provides as follows:

> A licensee that contravenes these regulations is liable to a fine not less than R300 000 (three hundred thousand Rand) but not exceeding R3 000 000 (three million Rand) once off per infringement.

The fine demonstrates the importance of numbers. Although the Regulation does not provide for a lesser fine, section 17E of the ICASA ACT makes it obligatory for the CCC in its advice to consider extenuating and aggravating circumstances. The fact that Avoxi is prepared to pay an amount to Realtime to settle the matter, demonstrates that it has conceded its error and is, at least, prepared to pay an amount to Realtime. This is regarded as an extenuating circumstance. Avoxi also does not have a record of previous contraventions. Nevertheless, the error was a grave one and the CCC has decided that a R100 000 fine would fit the grossly negligent contravention. Half thereof will be suspended for three years.
The CCC thus advises Council as follows:

That

(1) Avoxi (Pty) Ltd files with ICASA a sworn copy of the signed contract within 30 calendar days from the day on which this judgment is released and a receipt by Realtime for the amount set out in the agreement above;

(2) Avoxi, within 30 calendar days pays to ICASA a fine of R100 000, of which R50 OOO is suspended for three years, subject to the condition that Avoxi is not during the three years (from the day on which this judgment is released) found by the CCC to have contravened the same regulation.

J. C. W. van Rooyen

JCW VAN ROOYEN SC 10 January 2020

The Members of the CCC agreed