

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 10 March 2017

Case number 179/2016

IN RE: AIC TELECOMS (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Clr Nomvuyiso Batyi
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Nomfundo Maseti
Ms Mapato Ramokgopa

From the Complainant: Ms Ashley Barberis (MD) and Ms Praise Zuma Mphafi (Director); From Compliance (ECS and ECNS): Ms Veronica Matsane; From the Coordinator's Office: Attorney Meera Lalla; Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 15th January 2009 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service

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. The order of Council is enforceable in terms of section 17H (1)(f) of the ICASA Act.

Licence and an Individual Electronic Communications Network Service Licence to AIC Telecoms (PTY) Ltd (“AIC”).

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013 to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that AIC had not filed financial statements since it was issued with the licences. The following financial years were referred to: 2005-6, 2006-7, 2007-8, 2008-9, 2009-10, 2010-11 and 2011-12.

[3] It was noted that on 8 September 2016 the General Manager Consumer Affairs (CCA Division) at ICASA had granted AIC extensions of 12 and 24 months to become operational in respect of the two licences. The CCC must, in any case, consider what had taken place before that date.

MERITS OF THE CHARGE

[4] It should be pointed out that only the charge for 2011-2012 financial year was valid. This is so since the September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect. Financial years before 2011-2012 cannot be part of the alleged contraventions before the CCC, since the earlier Regulations were repealed by the February 2011² and September 2011³ Regulations. The Constitution of the Republic of South Africa 1996⁴ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁵ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013,⁶ with a copy to AIC. Thus, only the omission to file the financial statement for the year 2011-2012 was before the CCC. The same principle applies to the USAF contributions and licence fees. Since it is not disputed that AIC was not active in terms of its licences for the said year – and has, in fact not been active under its licences at

² The ICASA USAF Regulations (Feb) 2011.

³ Two sets of ICASA Regulations published (Sept) 2011.

⁴ See section 35(3) (l). Cf. *Masiya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoi v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁵ And it is constitutionally acceptable. Thus, the death penalty could not be imposed for murder committed even before the interim Constitution of the Republic became effective in April 1994.

⁶ No date in 2013 was mentioned

the time of the hearing of this matter – it had no duty to file financial statements. The charge concerning the non-filing of the 2011-2012 financial statement is, accordingly, dismissed.

NON ACTIVITY

[5] A last question is, however, whether the licensee should not be held responsible for not having applied for an extension earlier. The answer is in the negative. The above mentioned *Government Gazettes* relating to the years 2011-2012 and 2012-2013 only called upon licensees to file financial statements. No mention was made of a duty to inform ICASA if licensees were not active in terms of their licences. Only the 2013 *Gazette* called upon licensees to inform ICASA if they were not active under their licences. And that was done in a manner which did not state or imply that it would be a contravention if this was omitted.⁷ The present matter only relates to the omission to file financial statements and not to an omission to apply for an extension. The CCC cannot add to the charges. 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). A finding in this regard is, accordingly, not permissible in law.

FINDING

[6] The charge against AIC Telecoms (Pty) Ltd for not having filed its financial statement for the year 2011-2012 is not upheld since it was not active in terms of its licences.

The extension of the period to become operational granted by Compliance on 8 September 2016 is noted – see paragraph [3] above.

⁷ It should, however, be pointed out that the Regulations have, on 30 March 2016, been amended. The relevant provision is:

5. Commencement of operations

A Licensee must commence operation of the BS specified in the Licence within twelve (12) months from the date of issue, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months period.

In the present matter, as pointed out in the judgment, an extension to become operational was, in any case, granted to AIC on 8 September 2016.

J. C. W. van Rooyen

PROF JCW VAN ROOYEN SC

CHAIRPERSON

6 April 2017

The Members of the CCC agreed with the finding.