

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

Date of Meeting: 10 November 2016

CASE NUMBER 182/2016

**IN RE: ADVINNE TECHNOLOGIES (PTY) LTD**

**PANEL:** Prof JCW van Rooyen SC  
Councillor Nomvuyiso Batyi  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana  
Ms Mapato Ramokgopa

From the Coordinator's Office: Adv L Myeza  
Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On the 14<sup>th</sup> May 2012 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service Licence and an Individual Electronic Communications Network Licence to Advinne Technologies (Pty) Ltd ("Advinne"). The licence was stated to be effective from

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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. 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.

28 May 2009. However, it is also indicated on the licences that the transfer date was 14 May 2012.

[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 Advinne had not filed financial statements for the years 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012. The filing should have been done, according to Compliance, in accordance with General Notices<sup>2</sup> published in the *Government Gazette* in terms of the September 2011 Regulations regarding Standard Terms and Conditions for Individual and Individual Network Licences.<sup>3</sup> Furthermore, that no contribution had been made in terms of the February 2011 Universal Service and Access Fund ("USAF") Regulations and no licence fees paid in terms of the ICASA General Licence Fees Regulations 2012.

[3] 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 September 2011 Regulations. The Constitution of the Republic of South Africa 1996<sup>4</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>5</sup> The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Advinne and did not have a bearing on the financial year 2012-2013. Thus, only the omission to file the financial statement for the year 2011-2012 is before the CCC. The same principle applies to the USAF contributions.

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<sup>2</sup> Published in Government Gazette 16 September 2011 (Notice 640 of 2011) for the 2010-2011 financial year, 19 December 2012 (General Notice 11042) for the 2011-2012 financial year and 26 April 2013 (Notice 432 of 2013) for the 2012-2013 financial year.

<sup>3</sup> Individual Electronic Communications Service Licence Regulations and the Individual Electronic Communications Network Service Licence Regulations 2011. See Regulation 9 of each.

<sup>4</sup> 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].

<sup>5</sup> 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.

## **NON-ACTIVITY**

[4] After the first email from the Coordinator of the CCC was sent to Advinne on 8 June 2016 an answer was received from Advinne's Mr Amish Chana in an email of 30 June 2016. The latter attached a letter from Advinne's Accountants, Barnard Gilfillan, confirming that Advinne had not traded in terms of the licences during the financial years ending 29 February 2012, 28 February 2013 and 28 February 2014. In fact it appears from the papers before the CCC that the company was, in any case, not in existence in the 2011-2012 year, since it was only registered on the 17<sup>th</sup> February 2012. The business operation, according to the accountants, commenced in September 2015. A duly confirmed financial statement was attached for the 2015-2016 financial year. The latter year was, in any case, not included in the charges before the CCC.

[5] Given the fact that Advinne was only registered on 17 February 2012 and the licences had only been transferred to it on 14 May 2012, the charge which is before the CCC (2011-2012) amounts to a nullity. Advinne only took responsibility as a licensee on 14 May 2012. There is a note on both licences that the licence is "effective from 28 May 2009" but, as indicated above, the evidence before the CCC is that Advinne was only registered on the 17<sup>th</sup> February 2012 and, in any case, that the licences were transferred to it on 14 May 2012. There was, accordingly, no responsibility on Advinne to have filed a financial statement for the year 2011-2012. Even if there were omissions by a previous licensee a new licensee does not take responsibility for the duties of a previous licensee.

## **FINDING**

The charge is, accordingly, not upheld.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

10 November 2016

The Members of the CCC agreed with the finding.

