

COMPLAINTS AND COMPLIANCE COMMITTEE¹

DATE: 16 November 2017

CASE NUMBER:245 /2017

IN RE: BLUE IQ INVESTMET HOLDINGS

PANEL: Prof Jacobus van Rooyen SC, Cllr Dr Keabetswe Modimoeng, Mr Peter Hlapolosa, Mr Mzimkulu Malunga, Mr Jacob Medupe, Mr Jack Tlokana

Matter prepared by CCC Assessor Ms Meera Lalla (Attorney)

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1]On 15 January 2009 Blue IQ Investments Holdings, a State owned entity, was issued with an Individual Electronic Communications Network Service Licence (No 0109/IECS/Jan/09) and an Individual Electronic Communications Service Licence (No 0109/IECNS/JAN/09) by the Independent Communications Authority of South Africa (“ICASA”). These licences were placed before the CCC so as to decide whether to advise the Council of ICASA to make a declaratory

¹ An Independent Administrative Tribunal, in terms of section 33 of the Constitution of the RSA, at the Independent Communications Authority (ICASA) Act 13 of 2000. 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 from outside ICASA or references from within 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 is dismissed the decision is final and only subject to review by a Court of Law. Where a complaint 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 as to sanction by the Complaints and Compliance Committee, further reasons are not issued. Of course, copies of the final judgments is sent to the parties to the matter and is a public document. The final judgment is, once again, on application subject to review by a Court of Law. *The present matter does not relate to a sanction, but amounts to an advice by the CCC to Council in terms of section 17B(b) of the ICASA Act 2000.*

order that it no longer traded or had never traded in terms of its licences as issued to it.

[2] Despite notices in the 2011 and 2012 *Government Gazettes* to file Annual Financial Statements for the years 2011-2012 and 2012-2013² as well as a personal letter from the Manager Compliance (ECS and ECNS) at ICASA dated 5 October 2012, there was no reaction from the licensee. This matter was then referred to the CCC Coordinator so that it could be brought before the Complaints and Compliance Committee. It formed part of a substantial number of references by Compliance to the CCC Coordinator in June 2013. This created an administrative backlog of matters, each of which had to be processed in accordance with the rules of administrative justice and was, understandably, time consuming. The process of establishing whether the licensee had ever become active in terms of its licences, also led to an in depth inquiry by the Coordinator's Office into what had happened to the licensee and its licence.

[3] The Standard Regulations concerning Individual Licences 2010 (made operational in September 2011) require a licensee to apply to the Authority if it is unable to become active in terms of the licence within 12 or 6 months from the time that the licence was issued to it. The different time periods are based on whether it was a network licence or not. In the present case the licences issued fell in both categories, as indicated earlier. A substantial fine may be advised to Council by the CCC if an application to commence operations within the said periods was not lodged with the Authority.

SEARCH FOR LICENSEE

[4] Several attempts were made by the Coordinator's Office to obtain a response from the licensee as to the allegations of non-compliance. At the core of the matter was the question whether the licensee was or is active in terms of its licence. Attempts were made to reach the licensee at its postal address, on its landline and its fax facility. However, there was no response and the landline response indicated that the number did not exist. The Compliance Division at ICASA also indicated that the licence had not been transferred, according to its records. A search was also conducted via *Windeed*, an online

² And later similar Notices.

search company, and the reaction by 6 March 2017 was that “there is no information available that matches your search criteria.”

[5] On 5 July 2017 the ICASA Inspectorate was also requested to do an inspection of the property where the license was said to be held, according to the license. The report was that business was not on the premises and that other licensees inquired from stated that the company was “closed down years ago.” The licensee was also not a member of the Wireless Access Providers Association.

[6] A Notice on the ICASA website, with date 15 September 2017, calling upon the licensee to inform the Coordinator of the CCC on or before 17 October 2017 16:00 whether it had become active or not was ultimately placed on the ICASA website. The email address of the Coordinator was also provided on the Notice. There was no reaction from the licensee.

APPROACH

[7] The approach of the CCC in similar cases, which came before it from 2015, is that ICASA should not readily accept that a licensee has not commenced operations or that it is no longer operational, without notice. This cautionary approach is based on what Judge of Appeal Navsa stated in *MEC for Social Development v Mgodisa* 2010 (6) SA 415 (SCA):

It is clear that one cannot confidently deduce from what was stated by Ms Mpunzi that any of the actions contemplated in s 3(2)(b) of PAJA to give effect to procedurally fair administrative action were taken by anyone in the MEC's department, either in relation to the initial decision concerning the nature and duration of the grant, or in respect of its termination. On the contrary, one is constrained to *accept M's assertion, as the court below did, that she received no communication from the department indicating the nature and duration of the grant, and that she was made to believe that the grant was a permanent one, subject only to annual statutory review. It is equally clear that there was no communication about its termination, nor was an opportunity provided to M to make representations before the grant was terminated.* (italics added)

[8] In the light of the approach in the above matter, the CCC Coordinator has been at pains to undertake an in-depth inquiry into claims that a licensee has never commenced to operate or ceased operating without notice to ICASA. The CCC is satisfied that the Coordinator's Office has, once again, undertaken

such an investigation in the present matter and is convinced that there is no reliable evidence that the licensee commenced business within the prescribed terms of six or twelve months or, at all. Furthermore, that all reasonable steps have been taken to establish whether the licensee still exists or might have commenced operations. The conclusion is that there is no evidence that the licensee commenced business or applied for leave from ICASA to commence business at a later stage.

ADVICE TO COUNCIL AS TO ITS FUNCTIONS

[9] This is not a case where the CCC is advising Council as to a sanction in terms of section 17E(2) of the ICASA Act. The ultimate order would be in the nature of a declaratory order by Council that operations did not commence or have ceased. The CCC's decision, effectively, amounts to an advice to Council as to its functions in terms of section 17B(b) of the ICASA Act. One of Council's functions is, in terms of section 4(3)(e) of the ICASA Act, to revoke licences. In the normal course such a withdrawal will only take place after a full inquiry by the CCC and an advice to Council that the licence may be revoked as a *sanction*, resulting from several contraventions. However, in the present case it is clear to the CCC that a hearing cannot be held, simply because there is no trace of the licensee. It would also be senseless to issue a sanction against a respondent, the whereabouts or existence of which could not be established. Accordingly, the CCC is left with no other option but to advise Council that there is no evidence that the licensee still exists or had become operational or, if it had become operational, there is no evidence that it is presently operational. In fact, the reaction of several other licensees has been, on inquiry, that the licensee had "closed down years ago".

[10] The authority of Council to *revoke* a licence in terms of section 4(3)(e) of the ICASA Act would, in the CCC's view, also include the authority to declare that a licence no longer exists. The function of such an order is also to ensure certainty within this economic sphere and protect the public against licensees which have ceased operating formally or simply stopped having contact with ICASA.

[11] Such a notice by Council should be formal and the most appropriate manner to achieve that, would be to place the notice hereunder in the *Government Gazette*. A copy should also be placed on the ICASA Website.

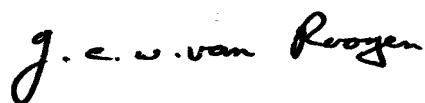
INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Individual Electronic Communications Network licence (No 0109/IECNS/JAN/09 and the Individual Electronic Communications Licence (No:0109/IECS/Jan/09) issued by the Independent Communications Authority of South Africa, in terms of the Electronic Communications Act 36 of 2005, to Blue IQ Investment Holdings with address 1st Floor Central Place Building, Newtown, Republic of South Africa 2000 and Postal Address PO Box 10420, Johannesburg, Republic of South Africa 2000 are declared to expire on the date of this Government Gazette either since it was not made operational within the time period prescribed by Regulation or since operations in regard to it have ceased without the licensee having applied to ICASA for authorization to do so.

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ACTING CHAIRPERSON: ICASA

Date:...../...../2017

It is thus so advised by the CCC



JCW van Rooyen SC
 Chairperson of the CCC

Date: 16 November 2017

The Members agreed with the above advice to Council as to its functions.

