



COMPLAINTS AND COMPLIANCE COMMITTEE

Date Heard: 5 May 2021

Case No: 402/2020

CCA

Type text here **COMPLAINANT**

Close TV

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Ms. Dimakatso Qocha - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC: Coordinator
Meera Lalla – CCC Assessor
Amukelani Vukeya- CCC Divisional Assistant

LEGAL REPRESENTATIVES FOR THE PARTIES :

B Maphakela appeared for the CCA
There was no legal representation for Close TV.
However, Dr. Dakile, the chairperson of Close TV, made submissions on behalf of the Respondent.

JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

- [1] The Complainant in this matter is the Complaints and Compliance Division of ICASA ("CCA"). It brought a complaint against the Respondent alleging that the latter contravened Regulation 5(1) and 5(3) of Schedule 1 (Individual Broadcasting Services Licences) of the Standard Terms and Conditions Regulations for Individual Licences 2010 (as amended in 2016), in that the respondent has failed to commence its operations to date.
- [2] The Respondent is Close TV Broadcasting Network Holdings (Pty) Ltd, trading as Close TV. It is the holder of an Individual Commercial Subscription Broadcasting Service Licence with registration number: 2012/13849/07.
- [3] In this judgment I shall refer to the Complainant interchangeably as the CCA and as Complainant. Similarly, the Respondent shall be referred to as Close TV and as Respondent interchangeably.

2. RELIEF SOUGHT

- [4] The relief sought by CCA is:
- "Appropriate penalties as prescribed by section 17E (2)(a) and (c) of the ICASA Act."

3. HISTORICAL BACKGROUND

- [5] On 19 March 2015 ICASA granted and issued to Close TV an Individual Commercial Subscription Broadcasting Service Licence. At the time, ownership of the shares held by persons from historically disadvantaged groups was 74.5%. In terms of the Licence "the Licensee is licensed to provide a multi-channel television subscription broadcasting service aimed at the general public and niche markets. The Licensee's primary target market shall be lesbians, gay, bisexual and

transgender ("LGBT")."

- [6] Six years later, Close TV has still not commenced its operations. More importantly, it has not made an application to ICASA for the extension of the commencement period.

4. THE LEGAL FRAMEWORK

- [7] Regulation 5 provides as follows:-

Regulation 5(1):- "A Licensee must commence operation of the Broadcasting Service specified in the Licence, within twenty-four (24) months from the date of issue in respect of Subscription Broadcasting Services, unless the Authority grants, on good cause shown, an extended commencement period on written application."

Regulation 5(3):- "An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub regulation 1."

Regulation 5(4) states that:

"Where a Licensee fails to adhere to the extension, this will constitute non-compliance and will be referred to the CCC to take a decision on cancelling the licence in terms of Section 14 of the Act and Section 17D of the ICASA Act."

5. CIRCUMSTANCES WHICH LED TO THE PRESENT COMPLAINT

- [8] On 15 April 2019, the CCA addressed an email to Close TV in which it informed the Respondent that it was in contravention of the relevant legislation. In the same email the CCA afforded Close TV an opportunity to provide the Authority with reasons, within ten (10) working days of receipt of the email, why it should not be referred to CCC for the said contraventions.
- [9] In response, Close TV set out a number of facts where it sought to persuade the CCA that it was active, making progress and would commence the operations soon. It is necessary to set out the facts concerned verbatim.

- 9.1 "Close TV has appointed Globecast as a technical service delivery partner for the ingestion and distribution of our content. To date, approximately 1200 hours of content has been ingested, transcoded and tested.
- 9.2 Close TV has invested approximately R6 million (six million Rands) during the 2018 financial year in the clearing of international content and R1.5m (one million five hundred thousand Rand), on local production for the creation and packaging of the various linear and on-demand OUTtv SA branded services. Furthermore, Close TV has entered into an agreement with OUTtv Global Network Inc. for the co-production of local LGBTQI content for distribution domestically as well as global export. It is envisaged that this will be a key lever for stimulating the local LGBTQI content production industry.
- 9.3 Close TV's OUTtv South Africa brand was the headline sponsor of the 2018 Johannesburg LGBTQI Pride March and Conference.
- 9.4 Close TV has launched a service branded OUTtv South Africa into the market. This service was launched initially as a limited period pop-up channel on Multichoice's Dstv Premium and Compact Plus bouquets from the period 4 October 2018 to 4 November 2018, to coincide with Pride month. The intent of this pop-up channel was to test market demand for and audience reaction to the Close TV content and to assist with informing commercial and technical considerations before full commercial launch. Valuable insights have been achieved from this process. Close TV is now in advanced commercial negotiations for the launch of an OUTtv service across Multichoice as a platform distribution partner.
- 9.5 Furthermore, Close TV is in the final stages of negotiations with Telkom for the distribution of OUTtv South Africa - both a linear channel and a Video-On-Demand service - on its LIT platform. Technical and billing integration is almost complete and the service is in a position for final testing prior to commercial launch...
- 9.6 Close TV is in the process of developing and testing a mobile OTT (Over-The-Top) application for the distribution of our services - to align with the rapidly changing consumer technology landscape and allow us to ensure a cost efficient commercial launch. We are in discussion with various platforms for the distribution of this OTT application.
- 9.7 Close TV has also been collaborating extensively with our global partners, OUTtv, headquartered in Vancouver, Canada, to co-produce content for domestic consumption and export into global market - with a view towards position South

Africa as a global hub for LGBTQI content production.”

9.8 In conclusion, Close TV states that it would welcome a meeting with the Authority to discuss the learnings from the above activities as well as share insights gained from their global partners.

[10] The above submissions were addressed to the CCA in support of a request that the complaint should not be referred to the CCC. Despite the request, the CCA still referred the matter to the CCC. I can find no fault in this decision for various reasons which are set out below:

10.1 None of what has been set out by Close TV in its papers and confirmed by Dr. Dakile, the chairperson of Close TV, in his submissions, explain why the respondent has, six years after it was issued with a licence, still not commenced with its operations.

10.2 According to Close TV, it has invested more than R6 million in various activities. It seems, therefore, that neither financial resources nor human resources are the issue.

10.3 The papers failed to explain why Close TV could not commence with its operations and still continue with the various activities that it is engaged in at the same time. Dr. Dakile’s presentation did not assist either to clarify the issue.

10.4 What does appear from the papers is that the activities listed are an integral part of the Respondent's operations some of which probably should have been done before Close TV applied for a licence. In fact, on its own version Close TV was currently “testing market demand for and audience reaction to the Close TV content”.

[11] With good reason, CCA takes the view that the Licensee was granted its Licence based on the market research which was based on the demand, need and support of the service as contemplated in section 51(a) and (b) of the ECA, amongst others.

[12] At the time of its application, the Licensee had already tested the market via the research submitted and motivated and persuaded the Authority to award Close TV the licence based on the premise that there is a need for the service. Therefore, there was no longer a need to test market demand, it was argued.

[13] I am inclined to agree with the CCA’s views in this regard. When a licence is issued by the Authority it is on the understanding that the licensee has done all the

preparatory work necessary before it commences its operations. Close TV cannot, therefore, be doing work that it should have done before it applied for a licence. And if the work forms part of the daily activities of the Respondent, it should not be a hindrance to commencing the operations.

[14] The work done by Close TV is significant in that it confirms that the Respondent has not given up on what it set out to do. As alluded to earlier, to its credit, it did not sit back and do nothing. On the contrary it invested time and energy as well as financial resources into various activities. It sought out partners and concluded agreements with co-production partners and distribution partners. That ought to count for something. However, as commendable as this is, it cannot be viewed as a defence. At best the facts set out in Close TV's papers can serve as mitigating factors.

[15] The above facts, however, ought to be balanced against aggravating factors set out hereunder:

15.1 It has been six years since Close TV was issued with a licence. And still it has failed to commence operations. This is an unreasonably long period, in my view. More concerning is that the delay is unexplained. Understandably, without any legal training, Dr. Dakile, may have had challenges formulating his submissions in this regard. This is something that cannot be ignored. For this reason, the CCC has taken this in consideration in its findings and order.

15.2 Close TV failed to make an application for an extension of the commencement period. Again, this may have to do with lack of understanding on the part of those responsible for the running of Close TV. There is good authority for the proposition that anyone who ventures into the business world should familiarize himself with the relevant laws applicable to his line of business. (See S v De Blom 1977(3) SA 513 (A) where the maxim "ignorance of the law is no excuse" was placed in perspective.

15.3 More than once Close TV made undertakings with regard to when it would commence but failed to meet each of the self-imposed deadlines. The CCC views this in a very serious light.

6. DOES CLOSE TV HAVE ANY PLAN OF ACTION?

- [16] The thrust of the purported defences by Close TV is that it is currently active and has progressed to a point where it is almost ready to commence its operations. What is of concern, however, is that the papers are devoid of any details explaining when exactly Close TV is to launch its operations.
- [17] On behalf of the CCA it was correctly pointed out that the lack of planning on Close TV's part was worrisome as the Respondent might, in the future, find itself in exactly the same position that it currently finds itself in. Having regard to the seriousness of the transgression, which, if repeated, can attract a revocation of the licence, the CCC advised the Dr. Dakile to seek legal assistance. This will assist Close TV to, among other things, formulate a clear plan of action as a way forward to avoid further contraventions.
- [18] Legal know how would also come in handy when Close TV presents its case to ICASA in due course. According to Dr. Dakile, Close TV has gained "various insights" and would welcome a meeting with the Authority where it would discuss some of these insights.

7. THE RELIEF SOUGHT

- [19] In the present matter there is no dispute that a contravention as alleged has been proved. The practical question to be answered is what kind of sanction is to be recommended to Council. As already mentioned, failure by a Licensee to commence operations as stipulated in the legislation is a serious matter.
- [20] The CCC has special but limited powers and duties in terms of section 17 of the ICASA Act 2000. Orders that it may recommend to Council are set out in Section 17E(2) of the Act, hereunder.
- [21] Section 17E(2) provides as follows:

"2. The CCC may recommend that one or more of the following orders be issued by the Authority, namely:-

- (a) direct the Licensee to desist from any further contravention;
- (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

- (c) direct the licensee to take such remedial or other steps not in conflict with this Act or underlying statutes as may be recommended by the Complaints and Compliance Committee;
- (d) where the licensee has repeatedly been found guilty of material violations
 - (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance Committee, subject to the proviso that a broadcasting or a communications service, as applicable, must not be suspended in terms of this sub-section for a period in excess of 30 days; or
 - (ii) amend or revoke his or her Licence; and
- (c) direct the licensee to comply with any settlement.”

[22] The seriousness of the transgression in this matter cannot be over emphasized. The seriousness of the violation, however, cannot be viewed in isolation but has to be viewed in the context of other equally important facts such as that Close TV is a first offender. Secondly Close TV’s willingness to meet with the Authority to plan the way forward is, in my view, a strong indication that it is willing to remedy the noncompliance.

8. CONCLUSION

[23] Having regard to all the relevant facts in this matter, the CCC is of the view that remedial action would be more appropriate than punitive measures.

9. FINDING

[24] The CCC’s finding is that Close TV has contravened Regulation 5(1) of the Standard Terms and Conditions Regulations, 2010 as amended in that it failed to commence it's operations as per the said regulation.

10. ORDER

[25] In terms of Section 17E2(c), the CCC recommends that the following order be issued by Council of ICASA:

25.1 Directs the licensee to desist from any further contravention in terms of section 17E(2)(a) of the ICASA Act

26. That Close TV takes the following remedial action:

- (a) Within 21 days, from the date ICASA publishes its judgment, Close TV is to submit an application, to Council of ICASA, for an extended commencement period.
- (b) Within 90 Calendar days from the date the application for extension of operations as mentioned in (a) above is granted, Close TV is to submit to Council of ICASA a comprehensive plan of action setting out, amongst others, operations plans, how to implement them as well as deadlines.

11. RECOMMENDATION TO COUNCIL OF ICASA IN TERMS OF SECTION 17B(b).

[27] Before the CCC can set out its recommendations to Council of ICASA, it is necessary to sketch a brief background.

[28] The matter above concerns a contravention of licence conditions by a licensee as well as contravention of Regulations set out in the judgment above.

Although the licensee was issued with a licence in 2015 and failed to commence its operations at the time stipulated in its licence, the CCA only alerted the Respondent of the alleged contravention, four years later, in April 2019. The CCA thereafter referred the matter to the CCC for investigations, hearing and adjudication.

[29] The CCC has noted, with concern, undue delays on the part of the CCA in dealing with licensees who violate their licence conditions and/or fail to comply with the relevant legislation. Failure to act promptly against transgressors may cause them to violate the laws concerned as well as other laws, with impunity and create the wrong impression among members of the public.

[30] The present matter, in which the Respondent, six years after it was issued with a

licence, still failed to commence its operations, amply demonstrates the need for the Authority to take prompt action against anyone who contravenes legislation.

[31] Recognising that there is a need for expeditious implementation of the legislation that regulates the Information and Communication Technologies (ICT), the CCC makes the following recommendation to Council of ICASA:

- Council investigates the aforementioned issue of delays by CCA to refer non-compliance, with a view to identifying the cause thereof and putting in place measures to prevent such delays in the future.

TMMasipa

Judge Thokozile Masipa
Chairperson of the CCC

Date: 19 May 2021

The CCC Members agreed with the finding and the order advised to the Council of ICASA.