



COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 4 SEPTEMBER 2024

CASE NO: 461/2024

**LICENSING AND COMPLIANCE
DIVISION**

COMPLAINANT

V

CLOUDSEED (PTY) LTD

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Councillor Yolisa Kedama - Member
Mr Monde Mbanga - Member
Mr Thato Mahapa - Member
Mr Paris Mashile – Member
Ms Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Meera Lalla – Acting CCC Coordinator
Thamsanqa Mtolo - CCC Assessor
Amukelani Vukeya – CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

For the Complainant - Keitumetse Setshedi
Emmanuel Mpenyani

For the Respondent -Henk Klopper
Samuel Sono

JUDGMENT

Judge Thokozile Masipa

INTRODUCTION

- [1] This is a complaint referred by the Licensing and Compliance Division (LCD) of the Independent Communications Authority of South Africa (ICASA) to the CCC against the Respondent for investigation in terms of section 17B(a)(i) of the ICASA Act.

THE PARTIES

- [2] The Complainant is the Licensing and Compliance Division (LCD) of the Independent Communications Authority of South Africa (ICASA).
- [3] The Respondent is Cloudseed (Pty) Ltd, ("Cloudseed"/"Respondent"), a Licensee that holds an Individual Electronic Communications Service (IECS) and Individual Electronic Communications Network Service (IECNS).

THE COMPLAINT

- [4] The Complainant alleged the following:

4.1 That the Respondent contravened Schedule 3(2) of the 2012 General Licence Fees Regulations which provide:

"All licence holders must submit within six (6) months of their financial year end:

(a) audited annual financial statements or,

(b) financial statements signed by the accounting officer of the Licensee where the Licensee is not legally obliged to provide audited financial statements."

[5] The Complainant alleged

5.1 that the Respondent failed to file its audited annual financial statements or financial statements signed by its accounting officer for the financial years 2020/2021 and 2021/2022;

5.2 that the Respondent contravened Regulation Schedule 3(7)(b) of the 2012 General Licence Fees Regulations which provides that:

"Annual Payments ... (b) are due and payable within 6 months."

[6] The Complainant alleged

6.1 that the Respondent failed to pay for its financial obligations for 2020/2021 and 2021/2022 financial years.

6.2 that the Respondent contravened Regulation 4(2) of the 2011 Regulations in Respect of the Prescribed Annual Contributions of Licensees to the Universal Service Access Fund which states that:

"Payments in respect of contributions to the Fund

(a) are due annually based on the Licensee's financial year;

(b) are payable within 6 months from the end of the Licensee's financial year."

[7] The Complainant alleged that the Respondent did not make the requisite payments for the 2020/2021 and 2021/2022 financial years.

[8] In terms of regulation 4(1) of the Regulations Governing Aspects of the Procedures of the CCC, as amended, the Respondent was requested to respond to the allegations.

Summary of the Complaint

[9] The General Licence Fees Regulations, 2012:

9.1 Schedule 3(2) obliges licence holders to submit their audited Annual Financial

Statements or financial statements signed by their accounting officer (where the licensee is not legally obliged to provide audited financial statements) within 6 months of their financial year end; and

9.2 Schedule 3(7)(b) dictates that Annual Payments with respect to the Annual Licence Fees are due and payable within 6 months from the end of the Licensee's financial year

[10] The Regulation in Respect of the Prescribed Annual Contribution of Licensees to the Universal Service and Access Fund, 2011:

10.1 regulation 4(2) provides that payments in respect to contributions to the Universal Service and Access Fund are due annually based on the Licensee's financial year and are also payable within 6 months from the end of the Licensee's financial year.

RELIEF SOUGHT

[11] The Complainant sought the following:

11.1 A finding of guilty against Cloudseed, for non-compliance with its regulatory obligations and that, in addition, the CCC should impose sanctions and or penalties it may deem appropriate as prescribed in terms of section 17E(2) of the ICASA Act.

THE RESPONDENT'S DEFENCE.

[12] In its response dated 10 May 2024, the Respondent stated, *inter alia*,

"2.1 Paragraph 2.1: The Respondent submitted its Annual Financial Statements for 2020/2021 on 23 March 2022. Additionally, on 8 March 2024, we submitted both 2020/2021 and 2021/2022.

2.2 Paragraph 2.2: The Respondent acknowledges the need to rectify the situation and expresses willingness to make the necessary payments. We are open to discussing the terms and conditions of such payments with the Complainant.

2.3 Paragraph 2.3 Similar to the above, the Respondent is committed to addressing the situation and is prepared to fulfill any financial obligations agreed upon with the Complainant.

[13] The Respondent concludes by stating that the delay in addressing the "*alleged non-compliance stems from the financial challenges*" that the Respondent was going through.

SUBMISSIONS

[14] The Licensing and Compliance Division confirmed that the Authority had received Annual Financial Statements for financial years 2020/2021 and 2021/2022; but stated that Cloudseed remained in contravention of Schedule 3(7)(b) of the General Licence Fees Regulations, 2012 and the Regulations in Respect of the Prescribed Annual Contributions of Licensee's to the Universal Service and Access Fund, 2011 in view of the fact that these submissions were not received by the due dates as required by the Regulation.

[15] It also confirmed that the Authority received licence fees calculations (that form part of the financial submissions) for financial years 2020/2021.

[16] According to the Complainant, Cloudseed had still not submitted to the Authority Licence Fees calculations (which form part of the financial submissions) for financial years 2021/22;

[17] In addition, still outstanding were payments for licence fees due for financial years 2020/2021 and 2021/2022 in accordance with:

- i The General Licence Fees Regulations, 2012 and
- ii The Regulations in Respect of the Prescribed Annual Contributions of Licensees to the Universal Service and Access Fund, 2011.

DISCUSSION

[18] The Respondent could not and did not deny the allegations made against it. Instead it sought to argue in mitigation.

[19] The Respondent could produce neither its audited financial statements nor financial statements signed by its accounting officer for the year 2020/2021 at the time these were due.

[20] It was noted that the Respondent eventually submitted them. However, that is not a defence. The requirement is that they be submitted within six months after the end of the Licensee's financial year. This was not done. Hence the insistence by the Complainant that the Respondent was guilty of non compliance.

[21] From the facts, it is clear that the alleged contraventions on all three charges have been proven. What remains for the CCC is to consider what is the most suitable sanction and to make recommendations to the Authority accordingly.

Mitigating Factors

[22] A mitigating factor that cannot be ignored is the fact we are here dealing with a first offender. The CCC took into account that since its inception, the Respondent has had no record of non compliance. How much of an impact that might make on the determination of an appropriate sanction, would depend on the totality of the evidence and the weight of aggravating factors.

Additional Written Submissions

[23] The Respondent was requested to provide additional written submissions to the CCC to ensure that a full picture of the challenges facing the Respondent was taken into consideration.

[24] In its additional submissions, Cloudseed included a number of documents sought to persuade the CCC that its non compliance with the Regulations was caused by financial difficulties that it had experienced during a specified period.

ANALYSIS

The Gravity and Seriousness of the Non-compliance

[25] From the above, it can be deduced that the Respondent failed to realise that the non compliance in respect of a Licensee's financial obligations to the Authority is very serious. What makes it even more serious, in this case, is the fact that the Respondent took a conscious decision to pay some of its debtors while ignoring its obligations to the Authority.

Consequences of the Non-compliance

[26] The CCC is unable to state with certainty what the consequences of the non compliance in this case are. This is because it has no resources or other means of measuring the consequences. Suffice it to state that any non compliance concerning financial obligations to the Regulator is against the public interest.

Steps Taken by the Respondent to Remedy the Non-compliance

[27] Respondent has not taken any steps to remedy the non compliance. In any event it is difficult to imagine any meaningful remedial steps except making payment of the outstanding debt to the Authority.

Steps Taken to Ensure that the Contravention is Not Repeated in Future

[28] The Respondent did not make any submissions to indicate what steps it was going to take to prevent similar challenges in future. This is worrisome, as without such plans, it is highly likely that the Respondent would soon find itself before the CCC facing the same problems.

[29] In the present case, as real as the financial difficulties faced by Cloudseed may seem, it is not easy to sympathise with the Respondent in its failure to comply with the Regulations.

[30] I say this because the defence by Cloudseed was not that it did not have money at all with which to meet its financial obligations. Instead, its defence was that with the

money it had, it was not able to meet every financial obligation it had.

[31] The Respondent, therefore, had to make a conscious decision or a choice regarding which debts to pay and which to defer until later.

[32] It is clear from the decision it took, that Cloudseed did not make its financial obligations to ICASA a priority. In fact, the Respondent specifically stated that its concern was to pay salaries so as to retain its workforce.

[33] Accepting the Respondent's alleged financial difficulties as a defence would set a bad precedent. I say this because it would give an impression that Respondents who are struggling financially are treated leniently than those who are doing well financially. That would be unfair as all persons are equal before the law irrespective of their financial muscle or lack of it.

[34] In my view, the correct sequence should have been to meet financial obligations to the Authority as a matter of priority. It is this compliance which enables the Licensee to operate within the law, thereby earning the entitlement to operate.

[35] Had Cloudseed met its financial regulatory obligations, this would have enabled it to operate in compliance and thereafter be in a position to meet its other obligations. It failed to do so at its own peril.

FINDING

[36] Having regard to all the facts and circumstances in this matter the CCC finds that the Respondent has contravened the Regulations as alleged.

RECOMMENDATIONS

[37] The CCC recommends to the Authority that it directs the Licensee to desist contravening the same regulations in future. Specifically,

37.1 from contravening 9.1 Schedule 3(2) which obliges licence holders to submit their audited Annual Financial Statements or financial statements signed by their accounting officer (where the licensee is not legally obliged to provide audited

financial statements) within 6 months of their financial year end; and

37.2 from contravening 9.2 Schedule 3(7)(b) which dictates that Annual Payments with respect to the Annual Licence Fees are due and payable within 6 months from the end of the Licensee's financial year.

37.3 from contravening the Regulation in Respect of the Prescribed Annual Contribution of Licensees to the Universal Service and Access Fund, 2011:

37.4 in particular, regulation 4(2) which provides that payments in respect to contributions to the Universal Service and Access Fund are due annually based on the Licensee's financial year and are also payable within 6 months from the end of the Licensee's financial year.

37.5 The said order is legally enforceable, should it be breached in future (section 17H(1)(f) of the ICASA and 2000 as amended.

[38] That the Respondent, in respect of the contravention of Schedule 3(2) of the 2012 General Licence Fees Regulations, is fined:

38.1 For the 2020/2021 financial year, an amount of R500 000.00 (five hundred thousand rand) for failure to submit the Annual Return within 6 months of its financial year end, with R100 000.00 (One Hundred Thousand Rand) payable within 90 days of the date of publication of the decision, provided an amount of R400 000.00 (Four Hundred Thousand Rand) shall be suspended on condition that the Respondent is not found guilty of a similar contravention in the next three years.

38.2 For the 2021/2022 financial year, an amount of R500 000.00 (five hundred thousand rands for failure to submit the Annual Return within 6 months of its financial year, with R100 000.00 (One Hundred Thousand Rand) payable within 90 days of the date of publication of the decision, provided an amount of R400 000.00 (Four Hundred Thousand Rand) shall be suspended for 3 years on condition that the Respondent is not found guilty of a similar contravention during the period of suspension.

[39] That the Respondent, in respect of the contravention of Schedule 3(7)(b) of the 2012 General Licence Fees Regulations, is fined:

39.1 For the 2020/2021 financial year, an amount of R100 000.00 (One Hundred Thousand Rand) for failure to submit the Annual Return within 6 months of its financial year end, with R50 000.00 (Fifty Thousand Rand) payable within 90 days of publication of the decision, provided an amount of R50 000.00 (Fifty Thousands Rand) shall be suspended for 3 years on condition that the Respondent is not found guilty of a similar contravention within the period of suspension.

39.2 For the 2021/2022 financial year, an amount of R100 000.00 (One Hundred Thousand Rand) for failure to submit the Annual Return within 6 months of the financial year end, with R50 000.00 (Fifty Thousand Rand) payable within 90 days of the date of publication of the decision, provided an amount of R50 000.00 (Fifty Thousand Rand) shall be suspended for 3 years on condition that the respondent is not found guilty of a similar contravention during the period of suspension.

[40] A total payment of R300 000.00 (Three Hundred Thousand Rand) in respect of contravention of the General Licence Fees Regulation is due and payable subject to the suspension as set out above. Should the Respondent fail to comply with the conditions for the suspension, the portion so suspended shall become immediately due and payable.

[41] That the Respondent, in respect of the contravention of Regulation 4(2)(a) of the 2011 Regulations in respect of the Prescribed Annual Contributions of Licensees to the Universal Service Access Fund, is fined:

41.1 For the 2020/2021 financial year, an amount of R500 000.00 (five Hundred Thousand Rand) for failure to submit the Annual Return within 6 months of the financial year end, with R100 000.00 (One Hundred Thousand Rand) payable within 90 days of the date of publication of the decision, provided an amount of R400 000.00 (Four Hundred Thousand Rand) shall be suspended for 3 years on condition that the Respondent is not found guilty of a similar contravention during the period of suspension.

[42] That the Respondent, in respect of the contravention of Regulation 4(2)(b) of the 2011 Regulations in Respect of the Prescribed Annual Contributions of Licensees to the Universal Service Access Fund, is fined:

42.1 For the 2020/2021 financial year, an amount of R100 000.00 (One Hundred Thousand Rand for failure to submit the Annual Return within 6 months of the financial year end, with R50 000.00 (Fifty Thousand Rand) payable within 90 days of the date of the publication of the decision, provided an amount of R50 000.00 (Fifty Thousand Rand) shall be suspended for 3 years on condition that the Respondent is not found guilty of a similar contravention during the period of suspension.

42.2 For the 2021/2022 financial year, an amount of R100 000.00 (One Hundred Thousand Rand) for failure to submit the Annual Return within 6 months of the financial year end, with R50 000.00 (Fifty Thousand Rand) payable within 90 days of the date of publication of this decision, provided an amount of R50 000.00 (Fifty Thousand Rand) shall be suspended for 3 years, on condition that the Respondent is not found guilty of a similar contravention within the period of suspension.

[43] A total payment of R200 000.00 (Two Hundred Thousand Rand) in respect of contravention of Regulations in Respect of the Prescribed Annual Contributions of Licensees to the Universal Service Access Fund is due and payable, subject to the suspension as set out above. Should the Respondent fail to comply with the conditions for the suspension, the portion so suspended shall become immediately due and payable.

[44] A total fine of R500 000.00 (Five Hundred Thousand Rand) is due and payable by the Respondent within 90 days of publication of this decision.



Judge Thokozile Masipa
Chairperson of the CCC

31 March 2025
Date