



Independent Communications Authority of South Africa

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**APPLICATIONS FOR THE TRANSFER OF AN INDIVIDUAL ELECTRONIC
COMMUNICATIONS SERVICE ("I-ECS") AND AN INDIVIDUAL ELECTRONIC
COMMUNICATIONS NETWORK SERVICE ("I-ECNS") LICENCE FROM
DOTCOZA (PTY) LTD TO EMALANGENI TECHNOLOGIES (PTY) LTD**

REASONS FOR DECISION

JUNE 2021

1. INTRODUCTION

This document sets out the reasons for the decision of the Independent Communications Authority of South Africa ("the Authority") in relation to the applications for the transfer of an I-ECS and an I-ECNS licence from Dotcoza (Pty) Ltd ("the Applicant") to Emalangen Technologies (Pty) Ltd ("the Transferee").

2. BACKGROUND

- 2.1 On 17 June 2020, the Authority received applications from the Applicant for the transfer of its I-ECS and I-ECNS licences to the Transferee.
- 2.2 The applications were submitted using regulation 11 (Form G) of the Individual Licensing Processes and Procedures Regulations 2010¹ ("the Processes and Procedures Regulations").
- 2.3 The Applicant did not request confidentiality in terms of section 4D of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000), as amended ("ICASA Act").
- 2.4 On 10 July 2020, the Authority published General Notice 383 in Government Gazette No. 43519 inviting all interested persons to make written representations in relation to the applications within fourteen (14) working days of the date of the publication of the notice in the Government Gazette. No written representations were received by the closing date of 31 July 2020.
- 2.5 The Authority elected not to hold public hearings as it was of the view that the applications were clear, and it had not received any written representations from the public with respect to the applications.

¹ As amended by Government Gazette No. 39871 of 30 March 2016.

- 2.6 On 15 December 2020, the Authority approved the Applicant's transfer applications.

3. THE TRANSFER APPLICATIONS

- 3.1. The full name of the Applicant is Dotcoza (Pty) Ltd. The Applicant's principal place of business is Liberty Centre, 1 Ameshoff Street, Braamfontein, Johannesburg, 2001. The Applicant is a private company registered in terms of the Companies Act 71 of 2008, as amended, ("Companies Act"), with the following registration number: 2013/178147/07.
- 3.2. The full name of the Transferee is Emalangen Technologies (Pty) Ltd. The Transferee's principal place of business is 22 Bulpin Street, Office 1B, Delta Complex, Nelspruit, 1200. The Transferee is a private company incorporated in terms of the Companies Act, with the following registration number: 2013/180113/07.

4. APPLICABLE LEGISLATIVE FRAMEWORK

- 4.1. The following legislative and regulatory provisions are applicable when dealing with transfer applications:
- (a) Section 9(2)(b) of the Electronic Communications Act, 2005 (Act No. 36 of 2005), as amended ("ECA")²;
 - (b) Section 13 (1), (2) and (6) of the ECA;
 - (c) Regulation 11 (Form G) of the Processes and Procedures Regulations³;
 - (d) Regulation 12 of the Processes and Procedures Regulations;

² The Authority must give notice of the application in the gazette and include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act.

³ An application to transfer a licence must be (a) in the format set out in Form G; (b) accompanied by the applicable fee; and (c) submitted by the prospective transferor.

- (e) Clause 9 of regulation 11 (Form G) of the Regulations⁴; and
- (f) Schedule 2 of the General Licence Fees Regulations as published in Government Gazette No 42370 of 01 April 2019 (Fees Regulations).

5. DISCUSSION AND ANALYSIS

5.1. Historically Disadvantaged Groups Ownership

5.1.1. Section 13(6) of the ECA provides that section 9(2) to (6) of the ECA applies to transfer applications.

5.1.2. Section 9(2)(b) of the ECA requires the Authority to give notice of the application in the Government Gazette and:

"include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act."

5.1.3. The Applicant has indicated that its ownership interests are as follows:

- Jens Von Bulow: 100%

5.1.4. Mr. Jens Von Bulow is a white male South African Citizen. The Applicant is not owned by persons from historically disadvantaged background.

5.1.5. The Applicant indicated that the ownership interests in the Transferee if approved, will be as follows:

- Sifiso Magonyane: 100%

⁴ Clause 9.2 requires an independent competition analysis report regarding the impact of this transaction.

On the relevant market clearly marked Appendix 9.2 of Form G.

Clause 9.3 requires a consumer interest analysis report post the transaction clearly marked Appendix 9.3 Form G

5.1.6. Mr Sifiso Magonyane is a black male South African Citizen. The Transferee is 100% owned by a historically disadvantaged individual.

5.1.7. The Authority is satisfied that the Transferee complies with the 30% minimum equity ownership by HDG's as contemplated in section 9(2) (b) of the ECA.

5.2. Approval of Authority

5.2.1. Section 13(1) of the ECA states that:

"An individual licence may not be let, sub-let, assigned, ceded or in any way transferred, and the control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of the Authority."

5.2.2. On 17 June 2020, the Applicant applied to the Authority seeking approval for the transfer of its I-ECS and I-ECNS licences.

5.3. Prescribed Format

5.3.1. Section 13(2) of the ECA states that:

"An application for permission to let, sub-let, assign, cede or in any way transfer an individual licence, or assign, cede or transfer control of an individual licence may be made to the Authority in the prescribed manner."

5.3.2. The prescribed format is contained in regulation 11 (Form G) of the Regulations, which states that an application to transfer a licence must be:

- (a) in the format set out in Form G;
- (b) accompanied by the applicable fee; and
- (c) submitted by the prospective transferor.

5.3.3. The transfer applications were submitted in terms of regulation 11 (Form G) of the Processes and Procedures Regulations. The Applicant has made the required payment of R132.840.00 for the transfer of its I-ECS and I-ECNS licences and provided the proof of payment.

5.3.4. Section 13(6) of the ECA provides that:

"The provisions of section 9(2) to (6) apply, with the necessary changes, to this section."

5.3.5. The Authority followed the process outlined in section 9 (2) to (6) read with section 13(6) of the ECA by complying with the following requirements:

- (a) Inviting interested persons to apply and submit written representations in relation to the applications within a period mentioned in the notice⁵. On 10 July 2020, the Authority published General Notice 383 in Government Gazette No. 43519 inviting all interested persons to make written representations in relation to the applications.
- (b) Including the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30% or such other conditions or higher percentage. The notice included the percentage of equity ownership to be held by persons from historically disadvantaged groups. The Transferee will be 100% owned by HDPs.
- (c) Setting out the proposed licence conditions that will apply to the licence. The Applicant has indicated that the Transferee will assume and continue to discharge those obligations imposed to the Licensee. The Applicant submitted a written undertaking given by the Transferee, through its duly authorised representative, that it will comply with the Applicant's Licence obligations.

⁵ Government Gazette No. 43519 of 10 July 2020.

- (d) The Authority did not receive any written representation in relation to the applications. However due to the implementation of the National State of Disaster in relation to Covid-19 and the applicable regulations at the time, the Authority made the applications available for public scrutiny on its website.

5.3.6. Regulation 12 of the Processes and Procedures Regulations states that the Authority may refuse to renew or transfer a Licence if the Licensee has not complied with one or more of the following:

- (a) where the Licensee has been found guilty of a contravention by the CCC and has not complied with the order by the Authority in terms of section 17 of ICASA Act; or
- (b) where the Licensee has not paid the Licence fees due and payable at the date of the application; or
- (c) where the Transferee's ownership and control by historically disadvantaged persons is less than 30%.

5.3.7. The Authority is satisfied that the Applicant was not found guilty of one of the regulatory grounds to refuse the transfer applications provided by Regulation 12 of the Processes and Procedures Regulations:

- (a) The Applicant has not been found guilty of any contravention by the CCC. On 18 June 2020, the CCC informed the Licensing Division that there were no compliance issues raised against the Applicant.
- (b) The Applicant has paid the prescribed licence fees due and payable at the date of the applications.
- (c) The Transferee is 100% owned by persons from historically disadvantaged groups.

5.4. Competition Analysis Report

- 5.4.1. Clause 9.2 of Form G⁶ requires the Applicant to provide an independent competition analysis report regarding the impact of this transaction.
- 5.4.2. The Applicant procured the services of Tsotetsi Attorneys Inc to undertake an independent competition analysis and prepare a report regarding the competition impact of the transaction as per Form G of the Processes and Procedures Regulations.
- 5.4.3. The premise of this requirement and the report is to evaluate the impact the transaction will have on competition in the ICT Sector post the conclusion of the transfer/ transaction.
- 5.4.4. The Application before the Authority falls under the definition of a merger as defined in section 12 of the Competition Act no. 89 of 1998, as amended ("Competition Act"). Further, the Competition Act provides for the determination of merger thresholds by the Minister of the Department of Trade and Industry ("DTI") in consultation with the Competition Commission ("CC"). On the 6 March 2009, the Minister of DTI published a notice in the Government Gazette about said threshold guidelines⁷. The following documents submitted by the Applicant were reviewed:
- (a) Consumer Interest Analysis Report⁸;
 - (b) Sale Agreement Resolution⁹;
 - (c) Reconciliation of Payments to the Authority to Audited Financials;
 - (d) 31 Dec 2019 Annual Financial Statements ("**2019FYDot**");
 - (e) Transferee's Business Plan and Past 3 Years Annual Financial Statements;
 - (f) Master Service Agreement between Broadband Infracore SOC Limited and the Transferee; and

⁶ Processes and Procedures Regulations.

⁷ Determination of merger thresholds and method of calculation. Government Notice No. 216, Government Gazette No. 31957 of 6 March 2009.

⁸ Consumer Analysis. Submitted.

⁹ Appendix 14.2 Submitted Transfer Application.

(g) Transferee's Company Profile.

- 5.4.5. On assessment of the submitted documents by the Applicant, the relevant markets for assessment are the retail market and mobile virtual network operator ("MVNO")/wholesale access point name ("APN") services¹⁰.
- 5.4.6. The Application before the Authority is below the lower threshold on both the Combined turnover/ Asset value and the Target turnover/ asset value matrices. As such qualifies as a small merger. Guidance is placed on the CC Thresholds and Guidelines ("Guidelines") due to the Authority not developing its own.
- 5.4.7. The Applicant submits that according to the De Minimis Rule, the conduct of a player with very negligible market share do not have an appreciable effect on competition unless the contrary can be proven. Furthermore, this supports the conclusion that the acquisition before the Authority is a small merger. On the requirements as set-out in the Guideline on Small Merger notification there is reasonable and adequate basis to conclude that the Application does meet the criteria for disclosure with the CC.
- 5.4.8. The Efficiency Defence assessment is not conducted as the Application before the Authority is not found to be anti-competitive.
- 5.4.9. On analysis on the facts presented in the application, the Authority is of the strong view that the genesis of the application before the Authority is an Asset Sale agreement between the Applicant and the Transferee.
- 5.4.10. Further on the 14th of May 2020, the Applicant submitted a letter to the Authority in respect to its Reconciliation of Payments to the Authority to Audited Financial Statements stipulating that they had not generated any fees in terms the ICASA issued licences¹¹.

¹⁰ As defined in Discussion Document on the Market Inquiry into Mobile Broadband Services.

¹¹ ICASA Submission.

5.4.11. The Transferee intends to use the ICASA issued licence to expand its services offering in a geographical scope and offer services beyond the Points of Presence of Broadband Infraco, which they have been leveraging on in their service provision.

5.4.12. On analysis of the matters presented by the Applicant and on an adequate and reasonable basis, the Authority finds that competition is not adversely impacted post the transfer in the market segment the Transferee is operating in.

5.4.13. The above analysis does not find adequate basis as to why the Application should be declined on an adverse competition impact basis post the transaction based on:

- The level of competition in the Applicant's market segment is not adversely impacted by the transfer of the Licence; and
- The level of competition in the Transferee's market segment is not adversely impacted by the transfer of the Licence.

5.4.14. The Authority's view is that there are no adverse competition effects post the transaction and moreover and that it is highly probable (indicative) that competition will be enhanced in the licenced services nationally by the Transferee, through the transfer of the licence. The submitted competition analysis report compiled by Tsotetsi Attorneys Inc supports this finding.

5.5. Consumer Interest Analysis Report

5.5.1. Clause 9.3 of Form G requires the Applicant to provide a consumer interest analysis report post the transaction.

5.5.2. The Applicant procured the services of Tsotetsi Attorneys Inc to undertake a consumer interest analysis and prepare a report regarding the impact of the transaction on consumers post the transfer of the licenses as per Form G of the Processes and Procedures Regulations.

- 5.5.3. The premise of this requirement is to evaluate the impact the transaction will have on consumer welfare post the conclusion of the transaction. In essence, the research question is to determine whether the consumer welfare is catered for post the transaction.
- 5.5.4. As contemplated in section 3 of the Consumer Protection Act 68 of 2008 ("CPA"), the Commission exercises primary authority to promote and advance the social and economic welfare of consumers in South Africa, and the Authority exercises primary authority to ensure universal and affordable access to high quality electronic communication services, broadcasting services and postal services, to consumers¹². Having an appreciation of who exercises primary authority in respect of consumers in individual licence transfers applications, a judicious reasonable and adequate conclusion requires consideration of the guiding legislation is the CPA. Hence; the CPA will provide guiding principles in the analysis provided hereunder. The Applicant provided the following documents, which were reviewed for the consumer analysis:
- a) Consumer Interest Analysis Report¹³;
 - b) Sale Agreement Resolution¹⁴;
 - c) Reconciliation of Payments to the Authority to Audited Financials;
 - d) 2019FYDot; and
 - e) Transferee Business Plan and Past 3 Years Annual Financial Statements.
- 5.5.5. The Applicant is selling its ICASA issued licence to the Transferee.¹⁵ According to the Applicant's submitted application, on the 20th of December 2019, a sale agreement disposing of The Assets was entered into by the Applicant and the Transferee. As referenced above, pages 4

¹² 1.3 Memorandum of Agreement entered into between the National Consumer Commission and the Independent Communications Authority of South Africa.

¹³ Consumer Analysis. Submitted.

¹⁴ Appendix 14.2 Submitted Transfer Application.

¹⁵ Consumer Analysis (Section 9.3 of Form G), Applicant Overview. Submitted.

and 29 of the Applicant's 2019 Annual Financial Statements provides supporting evidence.

- 5.5.6. The Applicant's submitted report purports a view that it is highly unlikely that its customers be adversely impacted post the transaction. Further, the Applicant can provide its service without a licence. On analysis of the 2019FYDot, the Applicant was using the licence for self-provision of communication services for companies within its group of companies. As such, the Authority supports the view on the consumer impact proposed by the Applicant in its submitted report.
- 5.5.7. The Applicants submits that the proposed Transferee provides services to public entities in different spheres of government, as such the CPA is not applicable in this regard. The Authority supports the viewpoint proposed by the Applicant in its submitted Consumer Analysis Report. Moreover, the Applicant submits that the transfer will not have a direct adverse causal impact on the customers of the proposed Transferee. The Authority hold a similar view.
- 5.5.8. The above analysis does not find an adequate basis as to why the Application should be declined on a post transaction customer impact basis; based on:
- The Applicant's consumers not adversely impacted; and
 - The proposed Transferee's consumers not adversely impacted.
- 5.5.9. The Authority is of the view is that consumer welfare is catered for post the transaction. The submitted consumer analysis report compiled by Tsotetsi Attorneys Inc supports this finding.

6. AUTHORITY'S DECISION

In the light of the above, on 15 December 2020, the Authority approved the transfer of the Applicant's I-ECS and I-ECNS licences to the Transferee.



DR KEABETSWA MODIMOENG
CHAIRPERSON

DATE: 25 / 06 / **2021**