

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 25 November 2016

CASE NUMBER 183/2016

IN RE: GAMSOL (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Mr Jacob Medupe
Councillor Keabetswe Modimoeng
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Nomfundo Maseti
Ms Mapato Ramokgopa

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

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 16th January 2009 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service

¹ 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.

Licence and an Individual Electronic Communications Network Licence to Gamsol (Pty) Ltd (“Gamsol”)

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013² to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that Gamsol had not filed financial statements for the years 2006-2007, 2007-2008, 2008-2009 and 2011-2012. The filing should have been done, according to Compliance, in accordance with General Notices³ published in the *Government Gazette* in terms of the September 2011 Regulations regarding Standard Terms and Conditions for Individual and Individual Network Licences.⁴ 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 February⁵ and September 2011⁶ Regulations. The Constitution of the Republic of South Africa 1996⁷ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁸ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Gamsol. Only the omission to file

² No mention of a specific date was made – an omission which should, as pointed out by Members of the CCC, in future references, be addressed. The CCC has, however, noted that it, as well as the Coordinator’s Office, are dealing with a substantial back log of a large number of matters referred to the CCC in 2013.

³ 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.

⁴ Individual Electronic Communications Service Licence Regulations and the Individual Electronic Communications Network Service Licence Regulations 2011. See Regulation 9 of each.

⁵ The ICASA USAF Regulations (Feb) 2011.

⁶ Two sets of ICASA Regulations published (Sept) 2011.

⁷ 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].

⁸ 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.

the financial statement for the year 2011-2012 is before the CCC. The same principle applies to the USAF contributions and licence fees.

NON-ACTIVITY

[4] After the first email from the Coordinator of the CCC was sent ~~to Gamsol~~ to Gamsol in June 2016 an answer was received from Gamsol's Dr ~~Lerato Letlape~~ Lerato Letlape, one of the ~~a~~ directors of the company, dated 17 June 2016. Dr ~~Lerato-Letlape~~ Lerato Letlape requested more time and ~~then filed~~ then filed an affidavit dated 22 June 2016. The affidavit explained that the company had never been active in terms of its licences. This was confirmed by Gamsol's Accountants, Vula Accounting and Management Consultants cc.

[5] The above mentioned *Government Gazettes* relating to the years 2010- 2011 and 2012-2012 only called upon licensees to file financial statements. No mention was made of a duty to inform ICASA if licensees were not active in terms of their licences. Only the 2013 *Gazette* called upon licensees to inform ICASA if they were not active under their licences. The present complaint does not relate to the latter year 2012-2013. The CCC cannot add to the charges, which all related to years before 2012-2013. The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA).

[6] The CCC, during the hearing of this matter, required that Dr ~~Lerato-Letlape~~ Lerato-Letlape, file a further affidavit in which more details are given as to why the company was not active and why he had not considered filing any materials to ICASA. This information would assist Compliance in its record keeping. However, as explained above, Gamsol had only been charged with not filing financial statements and, accordingly, not paying USAF fees and licence fees. It was not charged with not having informed ICASA of its non-activity. In any case, such information was only called for in the Government Gazette as to the financial year 2012-2013 – which is not before the CCC in any case.

FINDING

[7] As appears from the previous paragraphs, Gamsol (Pty) Ltd has not been active in terms of its licences. No duty, accordingly, arose to file financial statements for those years.

Since Gamsol was not charged for not informing ICASA that it had not been active, no finding is made in this regard. The Government Gazettes of 2011 and 2012, in any case, did not require a notice of non-activity to be given.

The charges are, accordingly, not upheld.

ADVICE TO COUNCIL IN TERMS OF SECTION 17B(b) of the ICASA Act.

[8] Section 17B of the ICASA Act (accent added) provides as follows:

17B. Functions of Complaints and Compliance Committee

The Complaints and Compliance Committee -

- (a) must investigate, and hear if appropriate, and make a finding on -
 - (i) all matters referred to it by the Authority;
 - (ii) complaints received by it; and
 - (iii) allegations of non-compliance with this Act or the underlying statutes received by it; and
- (b) **may make any recommendation to the Authority necessary or incidental to -**
 - (i) **the performance of the functions of the Authority in terms of this Act or the underlying statutes;** or
 - (ii) achieving the objects of this Act and the underlying statutes.

In the light of the above, Council is advised to instruct Compliance (ECS & ECNS) at ICASA to require Dr Lerato Letlape from Gamsol (Pty) Ltd to file the formal documentation as to non-activity with that Division within 30 calendar days from when this judgement is released, if Gamsol (Pty) Ltd has not already done so after the hearing of this matter on the 25th November 2016.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

10 December 2016

The Members of the CCC agreed with the finding.

