

COMPLAINTS AND COMPLIANCE COMMITTEE¹

DATE: 13 December 2017

CASE NUMBER: 230 /2016

IN RE: GOAL TECHNOLOGY SOLUTIONS (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Dr Keabetswe Modimoeng
Mr Peter Hlapolosa
Mr Mzimkhulu Malunga
Mr Jacob Medupe
Mr Jack Tlokana

Matter prepared by Assessor to Coordinator Mr Tamsanqa Mtolo
Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 15 January 2009 Goal Technology Solutions (Pty) Ltd (“Goal Technology”) was issued with an Individual Electronic Communications Service Licence and an Individual Electronic Communications Network Services Licence by the

¹ An Independent Administrative Tribunal 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. A copy 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.*

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 order that the company no longer traded or had never traded in terms of the licences as issued to it by ICASA. The effect thereof would be to withdraw the licences.

[2] On the papers before the CCC, as filed by ICASA Compliance (Licensing), it was alleged that the licensee had not filed financial statements with ICASA since it was issued with its first licence – the first financial year having been indicated as being 2007-2008. The licence – judging from the papers before the CCC – was then converted to the present licences in 2009. The charge for non-filing of financial statements referred to the years 2007-8, 2008-9, 2009-10 and 2011-12.

REGULATIONS APPLICABLE

[3] The 2010 Regulations in accordance with which Goal Technology was referred to the CCC by the Compliance (Licences) Division at ICASA in 2013, became operational from September 2011 – having repealed earlier Regulations. The Constitution of the Republic of South Africa² does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.³ That means that, in the ordinary course, the financial years before 2011-12 are not within the jurisdiction of the CCC. Later years are also not before the CCC, since this reference was made during 2013 and did not include a reference to the financial year 2012-2013. The same principle applies to the omission to pay USAF and licence fees. Of course, the debts (if any) for USAF and Licence fees remain intact.

NON-ACTIVITY

[4] However, to get back to the issue before the CCC in this matter. Despite notices in 2011 and 2012 *Government Gazettes* to file Annual Financial Statements for the years 2011-2012 and 2012-2013, there was no reaction from the licensee. In fact, there is no record of the licensee ever having

² 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].

³ 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.

communicated with Compliance at ICASA after the issue of the 2011 licences – or even before that. This matter was referred to the CCC Coordinator in June 2013 so that it could be brought before the Complaints and Compliance Committee. It formed part of a substantial number of references by ICASA Compliance (Licences) 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 no answers from the licensee and then a search as to whether the licensee still exists and, if so, whether it is operational.

[5] The Standard Regulations concerning 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 6 or 12 months from the time that the licence was issued to it. The different time periods are based on whether it is a network licence or not – the latter falling into the shorter period. A substantial fine may be advised to Council by the CCC if an application to not commence operations after the said 6 or 12 months had not been lodged with the Authority. This could, however, only be the result if the licensee is charged for not so applying. That was not the charge in this case.

ATTEMPTS TO FIND THE LICENSEE

[6] Several attempts were made by the Coordinator's Office to obtain a response from the licensee as to the allegation of non-compliance. There was no response. We, however, need not go into the detail of the search, since after the Coordinator published a Notice in this regard on the ICASA website, the firm Mazars, Johannesburg responded. In a letter dated 6 October 2017, Mr Gavin Klein, from the firm, stated as follows:

GOAL TECHNOLOGY SOLUTIONS (PTY) LTD (IN LIQUIDATION) ("GTS")

1. The above matter and our telephone discussion in relation thereto refer.
2. I confirm that GTS was placed in liquidation on 25 June 2010 under Master's Reference Number G1174/10 and that Norman Klein of our office was appointed as one of three joint liquidators by the Master of the High Court. A copy of the Final Certificate of Appointment issued by the Master is enclosed under cover hereof

as Annexure "A".

3. Assets comprising the core business of GTS were disposed of in terms of a sale agreement entered into between the liquidators and Bondev Midrand (Pty) Ltd on 28 February 2011. We are advised that these assets have been on-sold by Bondev and that they presently vest with an entity that is part of the MTN group of companies.
4. The insolvent estate of GTS has not yet been finally wound-up and our administration thereof is ongoing.
5. In July 2017, in the midst of this, we were made aware that ICASA may still consider that an Individual Electronic Communications Service Licence and an Individual Electronic Communication Licence ('the licences') previously held by GTS may in fact still vest with the insolvent entity....
6. Essentially, the liquidators are tasked with realising any asset owned by GTS and distributing the proceeds of such realisation amongst proved creditors in its insolvent estate. We are now in the process of obtaining legal and technical advice as to whether the licenses in question still vest in GTS or whether they were validly disposed of in terms of the sale agreement with Bondev or the subsequent sale agreements entered into by GTS's would-be successors in title. Due to the time elapsed and the complexity of the matter, such investigations are currently ongoing.
7. As such, the liquidators would greatly appreciate you providing us with the necessary documentation to be completed by us in order for us to obtain an extension of time in order to activate the licences. We would also ask that you kindly provide us with copies of the licences and any relevant identification numbers on record.
8. We thank you most sincerely for your understanding and assistance in this matter and I am available at any time should you have any queries.

APPROACH

[7] Section 14 of the Electronic Communications Act 2005 provides as follows:

14. Suspension or cancellation of individual licence

- (1) **The Authority may suspend or cancel an individual licence granted in terms of this Act -**
 - (a) where the licensee agrees in writing to such suspension or cancellation;
 - (b) in accordance with a decision made by the Authority in terms of section 17E of the ICASA Act; or
 - (c) **where the licensee is placed in *liquidation*, whether voluntary or compulsory..., either provisionally or finally.**

- (2) The suspension or cancellation of an individual licence takes effect on the date set forth in a written notice of suspension or cancellation served on the licensee by the Authority.
- (3) **Once the suspension or cancellation of an individual licence has taken effect, the Authority must, as soon as practicable, publish the suspension or cancellation in the *Gazette*.**
- (4) A delay or failure to publish the notice of suspension or cancellation in the *Gazette*, does not in any manner affect the validity of the suspension or cancellation.

[8] The CCC Coordinator has invited Mazars to a hearing of the matter so as to ensure that the *audi alteram partem* rule be complied with. The response was that the matter should be decided on the papers before us, since Mazars was not in a position to add to what it had conveyed in its correspondence to the CCC Coordinator. Given the facts provided the CCC was prepared to reach a decision as to this matter.

[9] After due consideration of the facts before it, the CCC came to the conclusion that it would advise Council to cancel the licences in terms of section 14 of the ECA as quoted above. There has been no reaction to ICASA of activity in terms of the licences from Goal Technology Solutions(Pty) Ltd from the date of issue and re-issue. There is also no record of authorisation by ICASA of any sale of the licences. It is not disputed that Goal Technology Solutions (Pty) Ltd has been liquidated.

ADVICE TO COUNCIL AS TO ITS FUNCTIONS

That the following notice be published in the Government Gazette

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Individual Electronic Communications Network licence (No 0144/IECNS/JAN/09) and the Individual Electronic Communications Licence (No144/IECS/JAN/09) issued by the Independent Communications Authority of South Africa, in terms of the Electronic Communications Act 36 of 2005, to Goal Technology Solutions (Pty) Ltd, is declared in terms of section 14 of the Electronic Communications Act 2005 to expire on the date of this Government Gazette, since it was placed in liquidation by the High Court on 16 July 2010.

.....

CHAIRPERSON: ICASA

Date:...../...../2018

It is thus so advised by the CCC

J. C. W. van Rooyen

JCW van Rooyen SC
Chairperson of the CCC

Date: 16 December 2017

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