

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 8 April 2016

CASE NUMBER 145/2015

IN RE: GORDON BAY SECURITY TRUST (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana
Ms Mapato Ramokgopa

In attendance From the Office of the Coordinator: Ms Meera Lalla

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 15 January 2009 Gordon Bay Security Trust (Pty) Ltd (“Gordon Bay Security Trust”) was issued with an Individual Electronic Communications

¹ An Independent Administrative Tribunal 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.

Service Licence and an Individual Electronic Communications Network Service Licence by the Independent Communications Authority of South Africa (“ICASA”). These licences substituted a licence which had been issued in July 2007. ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”), alleging that Gordon Bay Security Trust had not filed financial statements for the financial year-ends 2008 to 2012, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid. The relevant Regulations under which the reference was made are both from 2011.²

[2] There were also allegations, as would appear from the above, that no financial statements were filed for the years 2008-2011 and no fees paid for the said years. These omissions would fall under repealed regulations. The Constitution of the Republic of South Africa³ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁴ The allegation of omissions to file annual financial statements before 2012 year end fall under the repealed regulations. The charge was under the present 2011 regulations which indirectly deal with the duty to file annual financial statements.⁵ Thus, only the contravention relating to the non-submission of the 2012 year-end is before the CCC. Earlier alleged omissions are, accordingly, not before the CCC since they relate to dates before the 2011 Regulations became operative, including year-end 2011, which would be February 2011. The earlier debts, however, have remained intact and were, in any case, all paid by Gordon Bay Security Trust. In fact, all debts were paid up to and including the 2015 financial year-end. All the financial statements were signed by JN Chartered Accountants, who also confirmed income and expenses in terms of the licences, which were combined with the general statements of the Company. These statements also included income and

² USAF = February 2011 and the other two September 2011 – see the Addenda to this judgment.

³ 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].

⁴ 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.

⁵ Indirectly A Government Gazette Notice by ICASA reminded licensees to file 2012 year-end financial statements.

expenditure relating to facets of the business not related to the licences. However, the supporting signature from the Chartered Accountants is, of course, satisfactory. The statements as approved by the Chartered Accountants also clearly show the amounts owing for USAF contributions and licence fees.

[3] In a letter from Ms Marietjie van der Merwe from Gordon Bay Security Trust she states that she had earlier pointed out to ICASA that it was difficult and expensive to make relevant extracts from the financial statements, since the statements combined income and expenses from the business as a whole. She also states:

“[W]ith this letter, we will be submitting every document that we have submitted before since our inception, which was in 2009. The financial statements of the security company will also be attached. You are more than welcome to go through the statements and extract whatever information you need for us to comply with your request, but I believe that this is an impossible task and thus the reason for us giving you a layout via our Auditor of how the finances are generated from the two different departments.”

[4] We are of the view that the approach of Ms van der Merwe is supported by practical necessity and cost effective principles. The supporting documentation from the Auditors accords with good business practice principles and we cannot fault this style of financial reporting. The style of reporting at the very least amounts to substantial performance, which is regarded as compliance by the Constitutional Court.⁶ And, in any case, there is no evidence before us as to why the support of the chartered accountants should not be accepted. In fact, it would be surprising if they could be faulted.

⁶ That “substantial compliance” in effect amounts to “compliance” is borne out by several decisions of our Courts. Compare *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para. [21] where Acting Chief Justice Moseneke stated as follows: “While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal. Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and Mrs Ferris had substantially complied by the time summons was issued — at that stage they had only paid R1000 of the almost R9000 owing under the order.”

COMPLIANCE

[5] Gordon Bay Security Trust is, accordingly, found to have not been in breach of the September 2011 Regulations. The financial statement for year-end 2012 is the only alleged omission which is constitutionally before the CCC.⁷ And that was filed timeously. The USAF-fee and licence fee for the year-end 2012 were also paid. There is no reason to doubt that the other financial statements are also in order, given the fact that they have also been vetted by *JN* Chartered Accountants. The supporting documentation, as approved by *JN* Chartered Accountants as to the payment of licence fees and USAF contributions can also not be faulted.⁸

In the result Gordon Bay Security Trust (Pty) Ltd has not contravened the relevant regulations.

Accordingly, no advice is provided to Council on sanction and the judgment is sent to Council for noting.



26 May 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding.

See addendum for relevant regulations

⁷ See footnote 3.

⁸ See the email of Marietjie van der Merwe dated 29 October 2015 attached to the documentation at page 22. On 2 November 2015 she states that Gordon Bay has from 2010 to 2015, paid R442258.84 to ICASA.

ADDENDUM: RELEVANT REGULATIONS

INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES LICENCES (Commencement: 12 September 2011)

1. Definitions

In these regulations terms used have the same meaning as in the Electronic Communications Act, (No. 36 of 2005) unless otherwise defined in these regulations:

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005) as amended;

“ECN” means an Electronic Communications Network;

“ECNS” means an Electronic Communications Network Service;

“ECS” means an Electronic Communications Service;

“Effective date” means the date on which the Licence is issued;

“Licence” means the individual ECS Licence issued to the Licensee in the form contained in Annexure C of these regulations;

“Licensee” means the person named in Licence and issued with a licence to provide services in terms of Chapter 3 of the Act.

“PECN” means a private electronic communications network; and

“Schedule” means the schedule to the Licence containing the specific terms and conditions which the Authority has imposed upon the Licensee in terms of section 9(7) of the Act and the related legislation.

2. Notification of licensee details and information

(1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes in its licence:

(a) the name of the Licensee;

(b) contact details;

(c) shareholder; and

(d) Notices and addresses

(2) Any change or transfers of shares undertaken in terms of 2(1)(c) above must comply with all licence terms and conditions and the Act.

3. Licence area

The licence area for operations under this Licence is the Republic or any part thereof.

4. Duration of the licence

The Licence is valid for twenty (20) years from the effective date.

5. Commencement and operation of service

(1) A Licensee must commence operation of the ECS specified in the Licence within six (6) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the six (6) months.

(2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

6. Services to be provided by the licensee

A Licensee must provide ECS by means of an ECN operated by ECNS Licensee or a licence-exempt PECN operator.

7. Safety measures

A Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take such safety measures as may be prescribed and in any event such reasonable and necessary safety measures to safeguard life or property, and to limit exposure to electromagnetic emission, radiation and related risks.

8. Provision of information

(1) The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide information, so as to enable it to:

(a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;

(b) allow for the assessment and allocation of applicable fees and related requirements;

(c) facilitate the efficient use of scarce resources; and

(d) collect and compile information to be used for the purposes of sectoral analysis, planning, reporting and conducting inquiries.

(2) In respect of each information request referred to in sub-clause (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and a contact person to whom queries may be addressed.

(3) The licensee must provide the information in accordance with such format as may be prescribed by the Authority.

9. Publication of tariffs and fees

(1) A Licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service:

(a) have been made known to the end-user by:

(i) making such prices and terms and conditions available for inspection at its offices during business hours; and

(ii) providing such details to anyone who requests same at no charge;

(b) have been filed with the Authority at least seven(7) days prior to the provision of the said service. In making such a filing, a Licensee must utilise a format approved by the Authority in writing.

(2) A Licensee must submit to the Authority, on a bi-annual basis, a record of the actual services provided and the actual tariffs charged therefore during the previous six months.

10. Metering and billing arrangements

(1) A Licensee shall install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.

(2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge.

(3) The invoice must include information for the entire period covered by such invoice as follows:

(a) details of services rendered to the end-user;

(b) breakdown of charges associated with services, and

(c) such other relevant information associated with the end-user's account.

(4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.

(a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:

(1) destination,

(2) dialled number,

(3) date,

(4) time,

- (5) duration, and
- (6) charge for each individual transaction.
- (b) The detailed itemised bill must be provided:
 - (i) via post or in an electronic format;
 - (ii) at such a price that takes into account the difference in the mode of delivery.

11. Specific terms and conditions

The Authority may impose additional terms and conditions upon the Licensee in terms of section 9(7) of the Act and the ICASA Act. These specific terms and conditions will be contained in the Schedule.

12. Contravention and fines

- (1) Upon a determination of non-compliance by the Complaint and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
 - (a) One Million Rand (R1 000 000) for contravention of regulations 2, 4, 5, 7, 8(2), 9 and 10;
 - (b) One Hundred Thousand Rand (R100 000) for contravention of any regulation not specified in regulation 12(1)(a), and
 - (c) One Hundred Thousand Rand (R100 000) for repeated contravention of the regulations.

13. Notices and addresses

- (1) Any notice or certification given by the Authority or the Licensee shall be in writing and:
 - (a) if delivered by hand to the recipient's address, it shall be deemed, until the contrary is proven, that it has been received at the time of delivery;

(b) if posted by pre-paid registered post from an address within the Republic of South Africa, it shall be deemed, until the contrary is proven, to have been received on the 14th day after the date of posting; or

(c) if sent by facsimile transmission during normal business hours, proof of successful transmission shall be deemed to be proof of receipt, unless the contrary is proven.

(2) A Licensee shall provide the Authority with an address where it will accept formal service of letters, documents and legal process in this regard as well as a fax and telephone number on which it can be contacted as set out in the Licence.

14. Short title and commencement

These regulations are called the Standard Terms and Conditions for Individual Electronic Communication Services 2010, and will come into operation by notice in the gazette.

15. Repeal of regulations

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Individual licences published in Notice 1138 of 30 November 2007 in its entirety.

INDIVIDUAL ELECTRONIC COMMUNICATIONS *NETWORK* SERVICES LICENCES 2011 (Commencement: 12 September 2011)

1. Definition

In these regulations terms used have the same meaning as in the Electronic Communications Act. (No. 36 of 2005) unless otherwise defined in these regulations:

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005) as amended;

“ECN” means an Electronic Communications Network;

“ECNS” means an Electronic Communications Network Service;

“Effective date” means the date on which the Licence is issued;

“Licence” means the individual ECNS Licence issued to the Licensee in the form contained in Annexure B of these regulations;

“Licensee” means the person named in Licence and issued with a licence to provide services in terms of Chapter 3 of the Act;

“Schedule” means the schedule to the Licence containing the specific terms and conditions which the Authority has imposed upon the Licensee in terms of section 9(7) of the Act and the related legislation.

2. Notification of licensee details and information

- (1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes in its licence:
 - (a) the name of the Licensee;
 - (b) contact details;
 - (c) shareholding; and
 - (d) Notices and addresses.

- (2) Any change or transfers of shares undertaken in terms of 2(1)(c) above must comply with all licence terms and conditions and the Act.

3. Licence area

The licence area is as defined in the Licence issued to a Licensee.

4. Duration of the licence

The Licence is valid for twenty (20) years from the effective date.

5. Commencement and operation of service

- (1) A Licensee must commence operation of the ECNS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement

period on written application, prior to the expiry of the twelve (12) months.

- (2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

6. Services to be provided by the licensee

A Licensee must construct, operate and maintain an ECN as well as provide ECNS in the licence area.

7. Safety measures

A Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take such safety measures as may be prescribed and in any event such reasonable and necessary safety measures to safeguard life or property, and to limit exposure to electromagnetic emission, radiation and related risks.

8. Provision of information

- (1) The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide information, so as to enable it to:
 - (a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;
 - (b) allow for the assessment and allocation of applicable fees and related requirements;
 - (c) facilitate the efficient use of scarce resources; and
 - (d) collect and compile information to be used for the purposes of sectoral analysis, planning, reporting and conducting inquiries
- (2) In respect of each information request referred to in sub-clause (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of

its information request, applicable response times and identify a contact person to whom queries may be addressed.

- (3) The licensee must provide the information in accordance with such format as may be prescribed by the Authority.

9. Publication of tariffs and fees

A Licensee must submit to the Authority, on a bi-annual basis, a record of the actual services provided and the actual tariffs charged thereof during the previous six months.

10. Metering and billing arrangements

- (1) A Licensee shall install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
 - (a) details of services rendered to the end-user;
 - (b) breakdown of charges associated with services, and
 - (c) such other relevant information associated with the end-user's account.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.
 - (a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:
 - (1) destination,
 - (2) dialled number,
 - (3) date,
 - (4) time,
 - (5) duration, and
 - (6) charge for each individual transaction.

- (b) The detailed itemised bill must be provided:
 - (i) via post or in an electronic format; and
 - (ii) at such a price that takes into account the difference in the mode of delivery

11. Specific terms and conditions

The Authority may impose additional terms and conditions upon the Licensee in terms of section 9(7) of the Act and the ICASA Act. These specific terms and conditions will be contained in the Schedule and may include but are not limited to:

- (a) Licence area;
- (b) ownership and control structures of the Licensee;
- (c) requirements for ownership and control by persons from historically disadvantaged groups in respect of the Licensee, in addition to any prescribed by the Authority;
- (d) human resources training and skills development undertaken by the licensee;
- (e) service requirements and quality standards; and
- (f) universal service and access obligations, including without limitation, detailed roll-out obligations and incentives for the provision of ECNS in rural and under-served areas, imposed by the Authority in addition to the payment of the prescribed contribution to the Universal Service and Access Fund.

12. Contravention and fines

Upon a determination of non-compliance by the Complaint and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

- (a) One Million Rand (R1 000 000) for contravention of regulations 2, 3, 4, 5, 7, 8(2), 8(3), 9 and 10.
- (b) One Hundred Thousand Rand (R100 000) for contravention of any regulations not specified in regulation 12(1)(a); and
- (c) Additional One Hundred Thousand Rand (R100 000) for repeated contraventions of these regulations.

13. Notices and addresses

- (1) Any notice or certification given by the Authority or the Licensee shall be in writing and:
 - (a) if delivered by hand to the recipient's address, it shall be deemed, until the contrary is proven, that it has been received at the time of delivery;
 - (b) if posted by pre-paid registered post from an address within the Republic of South Africa, it shall be deemed, until the contrary is proven, to have been received on the 14th day after the date of posting; or
 - (c) if sent by facsimile transmission during normal business hours, proof of successful transmission shall be deemed to be proof of receipt, unless the contrary is proven.
- (2) A Licensee shall provide the Authority with an address where it will accept formal service of letters, documents and legal process in this regard as well as fax and telephone numbers on which it can be contacted as set out in the Licence.

14. Short title and commencement

These regulations are called the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010, and will come into operation by notice in the gazette.

15. Repeal of regulations

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Individual licences published in Notice 1138 of 30 November 2007 in its entirety.

USAF REGULATIONS 2011

Applicable from 10 February 2011 (Regulations published in Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 repealed)

1. Definitions

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned.

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005, as amended)

“Agency fees” means the percentage of fixed fees due to the agent;

“Annual Turnover” means total revenue generated from Licensed Activity per annum less service provider discounts, agency fees, interconnection and facilities leasing charges, government grants and subsidies;

“Applicable Interest Rate” means the uniform interest rate set by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act 1 of 1999;

“BS Licensee” means broadcasting service licensee;

“ECNS Licensee” means Electronic Communications Network Service Licensee;

“ECS Licensee” means Electronic Communications Service Licensee;

“Fund” means the Universal Service and Access Fund established in terms of section 87(1) of the Act;

“Licensed Services” means ECS, ECNS and BS provided pursuant to a licence issued to a Licensee in terms of Chapters 3, 4 and 9 of the Act.

“the MDDA” means the Agency established in terms of the Media Development and Diversity Agency Act No. 14 of 2002;

“Service provider discounts” means financial incentives offered to service providers by licensees for the purpose of subscriber base improvement;

“USAF Contribution” means the payment due to the Fund in terms of these regulations.

2. Object of the regulations

- (1) These regulations seek to:
 - (a) prescribe the annual contributions to be paid to the Universal Service and Access Fund (“the Fund”) by persons issued with licences in terms of chapters 3 and 9 of the Act;
 - (b) specify the date when such contributions to the Fund become payable and the manner in which they must be paid.

3. Contributions to the universal service and access fund

- (1) Every holder of a licence granted in terms of Chapters 3, 4 and/or 9 or converted in terms of Chapter 15 of the Act, must pay an annual contribution of 0.2% of its Annual Turnover to the Fund.
- (2) A BS licensee who has paid an annual contribution to the MDDA must set off that contribution against its USAF Contribution, provided that the MDDA contribution and the USAF contribution against which it is set off are for the same financial year.

4. Payment of contributions

- (1) Where a legal entity holds any combination of a BS Licence, ECS Licence and/or ECNS Licence, such entity may calculate the USAF contribution based on the Annual Turnover from aggregated revenue generated from the combined licences.
- (2) 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; and
 - (c) May only be paid by way of an electronic transfer or via a direct deposit into the Authority’s bank account, and
 - (d) must be based on the:
 - (i) Audited annual financial statement of the licensee; or

- (ii) Financial statements signed and sworn to by the accounting officer of the licensee where the licensee is not legally obliged to provide audited financial statements.

5. Interest

Interest on all late payments in respect of contributions to the Fund is payable at the Applicable Interest Rate and in accordance with the manner prescribed in regulation 4 where payment is overdue.

6. Amendment or repeal

Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 is hereby repealed.

7. Contraventions and penalties

- (1) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
 - (a) One Hundred Thousand Rand (R100, 000. 00) for contravention of regulations 3, 4(2) and 5.
 - (b) Fifty Thousand Rand (R50, 000. 00) for contravention of all the regulations not specified in regulation 7(1)(a), and
 - (c) Additional One Hundred Thousand Rand (R100, 000. 00) for repeated contravention of the regulations.

8. Short title and commencement

- (1) These regulations will be effective from the date of publication in the Government Gazette.
- (2) These regulations will be called the USAF Regulations, 2011.

ICASA GENERAL LICENCE FEES REGULATIONS 2012

Section 7(1): Contraventions and penalties

- (1) Failure to pay the annual licence fees will result in the suspension of the licence issued by the Authority in terms of Chapter 3 of the Act until such time that the annual licence fees, plus interest, are paid in full.
- (2) Failure to comply with any other provision in these regulations will result in a fine not exceeding one million rand (R1 000 000.00).

