

# **COMPLAINTS AND COMPLIANCE COMMITTEE**

**DATE OF MEETING: 29 July 2015**

**CASE NO: 100/2015**

**IN RE: iCONNECT SA (PTY) LTD**

**PANEL: PROF. KASTURI MOODALIYAR**

**CLR. NOMVUYISO BATYI**

**MR. JACOB MEDUPE**

**MR. JACK TLOKANA**

NO APPEARANCE FOR THE LICENSEE, which was informed of a possible desist order in terms of section 17E(2)(a) of the ICASA Act 2000, but did not indicate that it wished to be present at a hearing.

COORDINATOR: Ms Lindisa Mabulu

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## **JUDGEMENT**

### **INTRODUCTION**

[1] iConnect SA (Pty) Ltd ( "iConnect SA") holds an Individual Electronic Communications Network Licence Services ("I-ECNS") licence with the licence no: 0300/IECNS/MAY/2009 and an Individual Electronic Communications Services licence ("I-ECS") with the licence no: 0300/IECS/MAY/09. In terms of these licences, the Licensee is authorised to construct, maintain and operate an electronic communications network, as well as provide electronic communications network services.

[2] This matter was brought to the CCC office by the Licensing and Compliance department of ICASA who informs us that the licensee is

under an obligation in terms of its license to furnish the Authority with Annual Financial Statements and payment of the General Licence fees and Universal Services and Access Fund (“USAL”) fees. Failure to do so amounts to non-compliance of the Electronic Communications Act 36 of 2005 (“ECA”).

## **ISSUES**

[3] It has come to our attention that iConnect SA failed to submit its audited Annual Financial Statements timeously for the financial year 2012/2013 and failed to pay annual financial fees for 2013/2014.

[4] The License and USAL fees due for the financial years 2012/2013 and the licence fee for 2013/2014 which were due on 31 August in that financial year and was not paid timeously.

[5] Payment for the 2012/2013 outstanding fees were made on 29 May 2015.

## **APPLICABLE LEGISLATION**

[6] Section 89 of the of the Electronic Communications Act 36 of 2005 (“ECA”) is the applicable section in this regard. Section 89 (1) provides that:

*“Subject to sub-section (3), every holder of a licence granted or considered to have been granted in terms of Chapter 3 must pay, in addition to any other fees contemplated in the ECA or the related legislation, the prescribed annual contributions of the licensee’s licenced activity to the Universal Service and Access Fund”.*

[7] The relevant set of regulations governing the payment of USAL fees came into effect on the 10<sup>th</sup> February 2011.<sup>1</sup> Therefore, only omissions to pay the USAF levy as from 10 February 2011 are before the CCC. The CCC is only legally mandated to act in terms of regulations that existed at the time of the alleged omission.

[8] Regulation 3 of the USAF Regulations, 2011 provides that:

*“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.”*

[9] In terms of Regulations 4(2) (a), (b) and (d) of the USAF Regulations, 2011, contributions are due annually based on the licensee’s financial year. The contributions are payable within six months from the end of the licensee’s financial year and must be based on the audited financial statements of the licensee or the financial statements signed and sworn by the accounting officer of the licensee when the licensee is not legally obliged to provide audited financial statements.

[10] In addition Regulation 9 of Regulations, 2011 stipulates:

*“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.”*

[11] The same issue arises regarding the filing of financial statements. Regulations.<sup>2</sup>

[12] This matter was referred to the CCC office in 2013 by the Licencing and Compliance department of ICASA. iConnect did not comply for the years 2012/2013 and 2013/2014 financial year end. Thus, only

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<sup>1</sup> See the Addendum for the full set of USAF Regulations.

<sup>2</sup> Regulations for Individual Electronic Communications Services Licences 2010 and Regulations for Individual Electronic Communications Network Services Licences 2010 (both effective from 12 September 2011). Regulation 8 is applicable. See Addenda to this judgement.

contraventions of Regulations from 12 September 2011 to 2013 may be adjudicated by the CCC in this matter.<sup>3</sup>

## **EVALUATION**

[13] As stated above, iConnect failed to submit its audited annual financial statements during the period in question being 2012/2013 and in addition, failed to make payment of the licence and USAL fees on time. We were not given an explanation for this non-compliance.

[14] Evidence in the form of an affidavit before us from Mr Calvin Grey Collett, the CEO of iConnect SA, states that the annual financial statements for the 2012/2013 period was delivered to the ICASA offices on 23 January 2015.

[15] It was submitted that the payment of fees for financial year 2012/2013 has been made. The annual licence fee for 2013/2014 Annual Licence Fee is still outstanding. iConnect only paid the USAF fee for 2013/2014. Interest for all late payments are still due.

## **ADVICE TO COUNCIL AS TO SANCTION**

[16] The CCC finds that iConnect did not meet its obligations in terms of Section 89 of the ECA and the requisite Regulations provided above. iConnect failed to submit its Annual Financial Statements and pay its licence and USAL fees for the period concerned 2012/2013 and Annual financial fees for 2013/2014.

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<sup>3</sup> Retroactive prohibitions of this nature are, in any case, constitutionally not permitted – compare section 35 (3)(l) of the Constitution of the Republic of South Africa 1996. The said section, indeed, deals with criminal offences, but the imposition of a sanction in terms of section 17E of the ICASA Act indirectly relates to criminal law, in so far as the omission to give effect to the sanctions could lead to a prosecution in terms of section 17H(1)(f) of the ICASA Act.

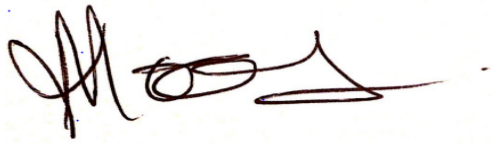
[17] In the light of these circumstances, and considering that iConnect has still not settled its obligations for the 2013/2014 financial year, we recommended to Council that a fine in the amount of Ten Thousand Rands (R10 000) would be appropriate for this case. The fine must be paid electronically to ICASA or deposited directly into the bank account of ICASA within 30 days of the date of issue of this judgment to the Respondent by the Coordinator of the CCC. The Coordinator will provide iConnect with the bank details of ICASA. For the purposes hereof, proof of payment for the said amount must be furnished via email with the Coordinator of the CCC-Imabulu@icasa.org.za

[18] Council is advised in terms of section 17B(b)<sup>4</sup> to refer the matter of interest for late payment of USAF contributions to the appropriate Division of ICASA to: (1) determine the amount owing by iConnect for interest on late contributions to USAF; (2) send an account to iConnect for the amount owing to be paid within 30 days of the date of the account; (3) and adding that if the amount is not paid by the date stated in the account, the matter will be referred to the CCC for the consideration of a recommendation to Council of the imposition of a fine, which may amount to a maximum of R100 000.

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<sup>4</sup> Section 17B(b) provides as follows: “The Complaints and Compliance Committee

- (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.



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**KASTURI MOODALIYAR**

**24 OCTOBER 2015**

ACTING CHAIRPERSON

Councillor Batyi, Mr Medupe, and Mr Tlokana concurred with the judgment of the Chairperson.

**SEE ADDENDUM**

## **ADDENDA: RELEVANT REGULATIONS ( as at 18 August 2015 )**

### **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 and 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 fifteen (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 Rands (R1 000 000) for contravention of [regulations 2, 4, 5, 7, 8\(2\), 9](#) and [10](#);
  - (b) One Hundred Thousand Rands (R100 000) for contravention of any regulation not specified in [regulation 12\(1\)\(a\)](#), and
  - (c) One Hundred Thousand Rands (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 Rands (R1 000 000) for contravention of [regulations 2, 3, 4, 5, 7, 8\(2\), 8\(3\), 9 and 10](#).
- (b) One Hundred Thousand Rands (R100 000) for contravention of any regulations not specified in [regulation 12\(1\)\(a\)](#); and

- (c) Additional One Hundred Thousand Rands (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 Rands (R100, 000. 00) for contravention of [regulations 3, 4\(2\) and 5](#).
  - (b) Fifty Thousand Rands (R50, 000. 00) for contravention of all the regulations not specified in [regulation 7\(1\)\(a\)](#), and
  - (c) Additional One Hundred Thousand Rands (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.