

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date of Hearing: 9 June 2016

CASE NUMBER 143/2015

**IN RE: IDHWEB CC**

**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: Attorney Meera Lalla; from Compliance Ms C Mhlongo; Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

[1] On 21 January 2010 IDH WEB cc (“IDHWEB”) was issued with a Class Electronic Communications Service Licence<sup>2</sup> by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance

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<sup>1</sup> An Independent Administrative Tribunal at ICASA, which was set up by the ICASA Council 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.

<sup>2</sup> The two sets of Regulations are reproduced in the Addendum to this judgment.

Division (ECS and ECNS licences), which has a delegated monitoring function under the supervision of the Chief Executive Officer of ICASA,<sup>3</sup> referred this matter in June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that IDHWEB had not filed financial statements for the years 2010-2011 and 2011-2012. The 2011-2012 financial statement should have been filed in accordance with a General Notice published in the *Government Gazette* in terms of the September 2011 Standard Regulations.<sup>4</sup> Furthermore, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) Regulations 2011 and no licence fees paid in terms of the ICASA General Licence Fees Regulations 2012.

[2] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have retroactive effect and, accordingly, the 2010-2011 financial statement cannot be part of the contraventions before the CCC. The earlier Regulations were substituted by the September 2011 Regulations. The Constitution of the Republic of South Africa<sup>5</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>6</sup> The allegation of omissions was sent to the licensee by the CCC Coordinator in October 2015. Thus, only the omission to file a financial statement for the year ending February 2012 is before the CCC. That does not mean that the liability to pay USAF fees and licence fees has fallen away. It only means that in this process - which could lead to the imposition of, for example, a fine - only one omission is before the CCC.

## **FINANCIAL STATEMENTS**

[3] Although the financial statement for year-end 2015 has been filed after a notice of this hearing was given, other financial statements have not been filed. The employee whose task it is to file financial statements and ensure that the necessary payments are made, explained in an affidavit that she was under the

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<sup>3</sup> See section 4(3)(b) of the ICASA Act read with section 4(4)(a)(iii) of the same Act.

<sup>4</sup> Section 9 of the Standard terms and Conditions for Class Electronic Communications Systems 2010 (see the addendum to this judgment). See General Notice 36008 in the *Government Gazette* of 19 December 2012.

<sup>5</sup> 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].

<sup>6</sup> 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.

impression that the accountant of the Respondent had been taking care of the filing and payments. She had been unaware of the duties in this regard and, now having been informed by the correspondence sent to IDHWEB, she would take care of these duties and ensure proper performance in terms of the Regulations. At the hearing of the matter Mr Viljoen, the majority shareholder, explained that the firm was going through a difficult time in so far as the licence was concerned, since a contract with a large client had come to an end. He inquired whether it would be in order simply to file the financial statements and not fill in the forms in this regard, since the accountant indicated that a fee would be charged for that. We ensured him at the hearing that as long as the duly confirmed financial statements were filed within sixty days from the date of the hearing, it would be in order.

[4] The fact that the statement for year-end 2015 was filed after this matter was brought to the attention of IDHWEB, does not absolve it from being found to have been in contravention of the omissions as to the 2011-2012 financial year. In fact, that would also have applied to other omissions in this regard. However, those omissions are not before us in this matter since the matter had already been sent to the Coordinator in 2013 and only related to pre-2013 years. A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Waglines Pty Ltd and Another*<sup>7</sup> Judge Didcott held that “ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*” To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice for a finding against a licensee. Compare *S v Longdistance Natal Pty Ltd*<sup>8</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

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<sup>7</sup> 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

<sup>8</sup> 1990 (2) SA 277 (A).

*“Mens rea<sup>9</sup> in the form of culpa<sup>10</sup> is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf S v De Blom 1977 (3) SA 513 (A) at 532G.)*

[5] Thus, even if it were to be accepted that IDHWEB did not act with intent in not filing financial statements, paying its licence fees and paying its USAF contributions, it must still be found to have been in contravention of the 2011 Regulations<sup>11</sup> for not having filed its year-end 2012 financial statement and not having paid the amounts due for USAF and licence fees in those years. As pointed out, the present charge, constitutionally, only relates to the 2011- 2012 financial statement and the 2011-2012 USAF fees and licence fees. As a licensee IDHWEB should at least have obtained legal advice as to its obligations in the light of the judgments referred to above, alternatively, managed its business with a higher degree of dedication to the relevant Regulations. The fact that it has, at this stage, filed its 2015 year-end financial statement is an extenuating circumstance in the consideration of the order which we should consider in our advice to Council. At the hearing the representative from IDHWEB, Mr Viljoen, also undertook to file missing statements within sixty days and pay the necessary fees. He was apologetic in his approach to the matter and, as stated earlier, the employee involved had not acted deliberately and had thought that the duty was that of their accountant.

## **FINDING ON THE MERITS**

[6] No financial statement for 2011-2012 was filed and, accordingly, also no licence fee and USAF contribution was made. The finding on the merits is:

(a) That IDHWEB has contravened the relevant 2011 Class licence Regulations read with the Notice in the Government Gazette (No 36008) dated 19 December 2012 by not having filed the 2011-2012 financial statement; and

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<sup>9</sup> Translated: “a guilty mind”.

<sup>10</sup> Translated: negligence.

<sup>11</sup> See the Class regulations, the USAF Regulations and the Licence Fees Regulations in the Addendum to this judgment.

(b) That it omitted to contribute to the USAF fund and omitted to pay licence fees for the year 2011-2012.

#### **ADVICE TO THE ICASA COUNCIL AS TO SANCTION**

**[7] In the light of the explanation given and the undertaking to file the missing statements within 60 calendar days from the hearing of this matter, the CCC recommends to Council to issue the following order:**

**IDH WEB is directed in terms of section 17E(2)(a) of the ICASA Act to desist in future from not timeously filing its financial statements, paying its USAF contributions and licence fees.**

The above order is legally enforceable.<sup>12</sup>



16 June 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the recommendation to Council on the sanction.

#### **ADDENDUM WITH RELEVANT REGULATIONS**

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<sup>12</sup> See section 17H(1)(f) of the ICASA Act 2000.

## **ADDENDUM: RELEVANT REGULATIONS**

### **STANDARD TERMS AND CONDITIONS FOR CLASS ELECTRONIC COMMUNICATIONS SERVICES 2010**

Commencement of GN R525: 12 September 2011

#### **1. Definitions**

In these regulations unless the context indicated otherwise:

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

“**Authority**” means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

“**ECS**” means an Electronic Communications Services as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECN**” means an Electronic Communications Network as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECNS**” means an Electronic Communications Network Service as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

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

“**Licence**” means the Class Electronic Communications Network Service Licence issued to the Licensee in the form contained in Annexure C of these regulations;

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

#### **2. Notification of change in 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:
  - (a) the name of the Licensee;
  - (b) contact details including the contact person;
  - (c) shareholding;

(d) physical address; and

(e) financial year end.

[Subr. (1) substituted by Gen N 155/2016]

**3. Licence area**

(1) The licence area is a district or local Municipality as defined in the Local Government Municipal Structures Act, No 117 of 1998.

(2) A Licensee must provide services within its licence area.

[Reg. 3 substituted by Gen N 155/2016]

**4. Duration of the licence**

The Licence is valid for ten (10) years from the effective date.

**5. Commencement of operations**

A Licensee must commence operation of the ECS specified in the Licence within twelve (12) months from the date of issue, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months period.

[Reg. 5 substituted by Gen N 155/2016]

**6. Hours of operations**

(1) A Licensee must provide electronic communication services for twenty four (24) hours per day unless the Authority has been notified of a shorter schedule of daily broadcast operations.

(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, the licensee must notify the Authority in writing of such circumstances within twenty four (24) hours.

**7. Services to be provided by the licensee**

The licensee must provide ECS by means of an ECN operated by an ECNS licensee.

**8. Safety measures**

The Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take reasonable and necessary safety measures to safeguard life or property, and limit exposure to electromagnetic emission, radiation and related risks.

**9. Provision of information**

- (1) *The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide any information including documents or books not ordinarily required, 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 radio frequency spectrum; and*
  - (d) *collect and compile information to be used for research purposes, planning, reporting and conducting inquiries.*
- (2) *In respect of each information request referred to in subregulation (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) *A licensee must provide the information in accordance with such format as may be prescribed by the Authority.*
- (4) *In the event where a Licensee or its representative refuse or fail to provide the Authority with requested information in terms of subregulation (1), the Authority may, after reasonable attempts, refer the matter to the Complaints and Compliance Committee.*

*[Reg. 9 substituted by Gen N 155/2016]*

## **10. 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 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 provide 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. Metering and billing arrangements**

- (1) A Licensee must 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, except where the end-user obtains services exclusively on a prepaid basis and the prices and terms of such prepaid service have been disclosed at the time of purchase.
- (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; and
  - (b) breakdown of charges associated with such services.
- (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) dialed 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
    - (a)(ii) at such a price that takes into account the difference in the mode of delivery.

## **12. Contraventions and penalties**

Any person that contravenes these Regulations is liable to a fine not less than R2 500, 00 (Two thousand, five hundred Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).

[Reg. 12 substituted by Gen N 155/2016]

## **13. Short title and commencement**

These regulations are called the Standard Terms and Conditions for Class Electronic Communications Services 2010, and will come into operation by notice in the Gazette.

## **14. Repeal of regulations**

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Class 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.

**ICASA GENERAL LICENCE FEES REGULATIONS, 2012**

Published under General Notice 299 in *Government Gazette* 36323 of 28 March 2013 as amended

**1. Definitions**

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005) has the meaning so assigned;

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

**“Accounting Officer”** means the Chief Financial Officer (CFO) or alternatively the executive in charge of financial management of the licensee, or equivalent;

**“Administrative fees”** means the fees payable in terms of regulation 3(2) and contained in Schedule 1;

**“Annual Licence fees”** means the fees payable in terms of regulation 3(1) and contained in Schedule 2;

**“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;

**“Licensed Service”** as defined in the Electronic Communications Act under “broadcasting service”, “electronic communications service” and “electronic communications network service”, and as contained in the relevant licence;

**“Revenue”** means Revenue as defined in terms of the International Accounting Standard 18 and disclosed in the Licensee's audited Annual Financial Statements, i.e. the gross inflow of economic benefits during the period arising in the course of the ordinary activities of the entity when those inflows result in an increase of equity other than increases relating to contributions from equity participants.

## **2. Purpose of these regulations**

The purpose of these Regulations is to prescribe -

- (a) the administrative fees payable in respect of an application or registration for a licence, amendment, transfer or renewal as contemplated in sections 4(1c)(iv) and 4(1)(c)(v) of the Act; and
- (b) The annual licence fees payable by licensees as contemplated in section 5(7)(a)(iii) of the Act.

## **3. Application**

- (1) The annual licence fees prescribed in these regulations and as set out in schedule 2 apply to holders of individual and class ECS Licences, individual and class ECNS Licences and individual commercial BS Licences.
- (2) The administrative fees are as set out in schedule 1 and:
  - (a) The method of payment prescribed in the Process and Procedure regulations as published in the *Government Gazette* 30916 and Notice 397 in *Government Gazette* 30914 dated 31 March 2008 applies; and
  - (b) May be adjusted by a maximum of the Consumer Price Index (CPI) as published by Statistics South Africa, effective on 1 April of each year.

## **4. Exemptions**

The following Licensees are exempt from the payment of annual licence fees:

- (a) Class Licences for Community Broadcasting (Sound); and
- (b) Public Broadcasting Services.

## **5. Payment of annual licence fees**

Payments in respect of annual licence fees are due as prescribed in schedule 2 and 3.

**6. Interest**

Interest on all late payments in respect of the annual licence fees is payable in accordance with the Public Finance Management Act, Act 1 of 1999, as amended (PFMA), at the applicable interest rate as published by the Minister of Finance.

**7. 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 rands (R1 000 000.00).

**8. Short title and commencement**

- (1) These regulations are called the ICASA General Licence Fees Regulations, 2012.
- (2) These regulations shall come into effect on 1 April 2013.

**9. Repeal**

- (1) In the event of any conflict between the provisions of this regulation and the licence terms and conditions which purports to impose Annual and/or Licence Fees, the provisions of this regulation prevail.
- (2) The ICASA General Licence Fees Regulations, 2009 are hereby repealed.

**SCHEDULE 1**

**ADMINISTRATIVE FEES**

[Schedule 1 substituted by Gen N 151/2016 and duplicated in Gen N 187/2016]

**SCHEDULE 2**

**ANNUAL LICENCE FEES**

**SCHEDULE 3**

**PAYMENTS IN RESPECT OF LICENCE FEES**

