

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 24 November 2016

CASE NUMBER 190/2016

IN RE: INAMANDLA INFORMATION TECHNOLOGY CC

PANEL: Prof JCW van Rooyen SC
Councillor N Batyi
Mr J Medupe
Prof K Moodaliyar
Mr J Tlokana
Ms M Ramokgopa

From the Coordinator's Office: Mr T Mtolo

From Compliance (ECS & ECNS) Ms JM Tlomatsane

From the licensee: Mr Ashraf Jamal

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 7th February 2011 the Independent Communications Authority of South Africa ("ICASA") issued an Individual Electronic Communications Service

¹ An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law. The order of Council is enforceable in terms of section 17H (1)(f) of the ICASA Act.

Licence and an Individual Electronic Communications Network Licence to Inamandla Information Technology cc (“Inamandla”). These licences replaced a Value Added Network Services Licence which was issued to Inamandla in November 2005.

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013² to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that Inamandla had not filed financial statements for the years 2006-2007, 2007-2008, 2008-2009 and 2011-2012. The filing should have been done, according to Compliance, in accordance with General Notices³ published in the *Government Gazette* in terms of the September 2011 Regulations regarding Standard Terms and Conditions for Individual and Individual Network Licences.⁴ Furthermore, that no contribution had been made in terms of the February 2011 Universal Service and Access Fund (“USAF”) Regulations and no licence fees paid in terms of the ICASA General Licence Fees Regulations 2012. It should be mentioned that a letter was sent to Mr Ashraf Jamal from the licensee on 3 October 2012 by the Manager: Compliance (ECS and ECNS). The letter reminded him that he had not made USAF contributions from 2006-2012. There was no response. There was also a letter to Mr Jamal dated 9 April 2013 reminding him that if operations had not commenced in terms of the licences, he had to file a request for an extension for commencement of operations within seven days and provide reasons for not having done so, if that were the case. There was no written answer, although Mr Jamal mentioned at the hearing that he had been to see the said Division two years ago – that would be in 2014 – and had explained that the licences were not operational.

[3] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have

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

³ Published in Government Gazette 16 September 2011 (Notice 640 of 2011) for the 2010-2011 financial year, 19 December 2012 (General Notice 11042) for the 2011-2012 financial year and 26 April 2013 (Notice 432 of 2013) for the 2012-2013 financial year.

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

retroactive effect. Financial years before 2011-2012 cannot be part of the alleged contraventions before the CCC, since the earlier Regulations were repealed by the February⁵ and September 2011⁶ Regulations. The Constitution of the Republic of South Africa 1996⁷ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁸ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Inamandla. Only the omission to file the financial statement for the year 2011-2012 is before the CCC. The same principle applies to the USAF contributions and licence fees.

NON-ACTIVITY

[4] At the hearing of this matter Mr Ashraf Jamal stated that he had never operated under the licences. He also mentioned that his attempts to obtain contracts from Sentech, Telkom and the Government were without success.

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

[6] The question which, however, arises in this matter is whether the letter sent by Compliance to Inamandla on 9 April 2013 informing Mr Jamal that he must inform ICASA if he had not commenced operations in terms of his licences, does not effectively add to the charges in the undated reference of this matter in 2013 from Compliance to the CCC? In the 3 October 2012 letter from Mr Maulana from Compliance, referred to in paragraph two of this judgment, there

⁵ The ICASA USAF Regulations (Feb) 2011.

⁶ Two sets of ICASA Regulations as to licensees' obligations published (Sept) 2011.

⁷ See section 35(3) (l). Cf. *Masiya v DPP, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC) at para [54]; *Savoi v NDPP* 2014 (5) SA 317 (CC) at para [73].

⁸ And it is constitutionally acceptable. Thus, the death penalty could not be imposed for murder committed even before the interim Constitution of the Republic became effective in April 1994.

was also a request to furnish ICASA with audited financial statements if Inamandla had not been active in terms of its licences. We have held that the filing of financial statements is not a requirement if a licensee is not active. It must, however, file a statement by its accountants confirming such non-activity. However, ultimately the CCC is bound by law to remain within its powers. The basis of the finding must be the charge and that was limited to the non-filing of financial statements and the omission to pay USAF fees and licence fees. The following statement of Judge of Appeal Navsa dictates that the CCC may only act within its mandate, and the mandate in this case is limited to a finding of an omission to file financial statements and pay fees – which is not a contravention where a licensee has not been active under its licences. Thus Navsa JA states as follows in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng 2013 (5) SA 24 (SCA)* at para [1] :

“Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law. Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.”(emphasis added, footnote omitted); also see Navsa JA’s judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another 2003 (2) SA 344 (SCA)*.

FINDING

[7] As appears from the previous paragraphs, Inamandla Information Technology has not been active in terms of its licences. No duty, thus, arose to file financial statements for those years

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

The charges are, accordingly, not upheld.

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

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

17B. Functions of Complaints and Compliance Committee

The Complaints and Compliance Committee -

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

In the light of the above, it is recommended to Council to instruct Compliance (ECS & ECNS) at ICASA to require Inamandla Information Technology to file the formal documentation as to non-activity with that Division within 30 calendar days from when this judgement is released, if it has not already done so after the hearing of this matter on the 24th November 2016.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

10 December 2016

The Members of the CCC agreed with the finding and recommendation to Council as to its functions.