

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

5 September 2016

CASE NUMBER 160/2015

IN RE: KAREL GREEFF

**PANEL:** Prof JCW van Rooyen SC  
Councillor Nomvuyiso Batyi  
Mr Jacob Medupe  
Mr Jack Tlokana

Assessor: Mr T Mtolo

Coordinator: Ms Lindisa Mabulu

---

## JUDGMENT

### JCW VAN ROOYEN SC

[1] On 12 November 2008 Mr Karel Greeff (doing business under the name WiFi-Technologies) was issued with a Class Electronic Communications Service Licence<sup>2</sup> by the Independent Communications Authority of South Africa

---

<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 Regulations are reproduced in the Addendum to this judgment.

“ICASA”). ICASA’s Compliance 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 on 20 June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that Karel Greeff had not filed financial statements for the years 2010-2011, 2011-2012 and 2012-2013. The financial statements should have been filed in accordance with General Notices 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. Initially, inquiries by the Coordinator’s Office led to a Notice on the ICASA website that if no response was received from the licensee, ICASA’s Council would regard the licence as having fallen away and issue a declaration to that effect in the *Government Gazette*. Ultimately, in August 2016, after thorough investigation by the Coordinator’s Office, the matter was brought to a close by that Office and referred to the CCC for consideration. Given that the matter was ultimately satisfactorily resolved, as would appear hereunder, it was not necessary for the CCC to hear the matter – see section 17B (a) of the ICASA Act. A judgment must, nevertheless, be issued and reasons provided as to why a so-called desist order against the licensee is advised to the Council of ICASA.

[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 2008-2009, 2009-2010 and 2010-2011 financial statements 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, as set out above, was sent to the licensee by the CCC Coordinator on 15 April 2016. Thus, only

---

<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.

the omissions to file financial statements for the years ending February 2012 and 2013 are before the CCC. That does not mean that the debt to pay USAF fees and licence fees has fallen away.<sup>7</sup> It, however, means that in this process only the omissions for two years are before the CCC.

## **FINANCIAL STATEMENTS**

[3] Mr Karel Greeff's response to the matter was that his venture, in so far as the licence was concerned, is a rather small one and that he was unaware of the duties in terms of Regulations as well as the Notices in the Government Gazette. There were also copies of earlier correspondence with ICASA, which are not relevant to the essence of the matter, but do show that there was, at least, some contact with ICASA. The impression gained from the correspondence and the steps taken to rectify the omissions and pay the debts, including interest for late payments, is that Mr Greeff would, in future, be compliant – having now been made aware of the omissions in terms of the Class Regulations 2011.

[4] The fact that the statements were filed and the payments made, does not absolve Mr Greeff from being found to have been in contravention of the omissions as to the 2011-2012 and 2012-2013 financial years. In fact, that would also have applied to other, later, omissions in this regard. However, those omissions are not before the CCC.

[5] A high standard of compliance is expected from a licensee and this was lacking in the present matter. In *S v Waglines Pty Ltd and Another*<sup>8</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*

---

<sup>7</sup> Since the debts plus interest have all been paid, it is not necessary to refer to possible prescription of debts older than three years - Compare MAIZE BOARD v EPOL (PTY) LTD 2009 (3) SA 110 (D); HOLENI v LAND AND AGRICULTURALDEVELOPMENT BANK OF SOUTH AFRICA 2009 (4) SA 437 (SCA); COMMISSIONER OF CUSTOMS AND EXCISE v TAYOB AND OTHERS 2002 (6) SA 86 (T); THE MASTER v I L BACK & CO LTD AND OTHERS 1983 (1) SA 986 (A); COMMISSIONER OF CUSTOMS AND EXCISE v TAYOB AND OTHERS 2002 (6) SA 86 (T).

<sup>8</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.

*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>9</sup> where Acting Judge of Appeal Nicholson stated as follows at 284:

“*Mens rea*<sup>10</sup> in the form of *culpa*<sup>11</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.)

[6] Thus, even if it were to be accepted that Mr Greeff did not act with intent in not filing financial statements, paying his licence fees and paying his USAF contributions, he must nevertheless be found to have been in contravention of the 2011 Regulations<sup>12</sup> for, negligently, not having filed financial statements and not having paid the amounts due for USAF and licence fees. As pointed out, the present charge, constitutionally, only relates to the 2011- 2012 and 2012-2013 financial statements and the related USAF fees, licence fees and interest for late payment. As a licensee Mr Greeff should at least have obtained legal advice as to his obligations in the light of the judgments referred to above, alternatively, managed his business with a higher degree of dedication to the relevant Regulations. That he has, at this stage, even filed his 2015 year-end financial statement and paid all debts is, however, an extenuating circumstance in the consideration of the order which we should consider in our advice to Council.

## **FINDING ON THE MERITS**

[7] No financial statements were filed for 2011-2012 and 2012-2013 and, accordingly, also no licence fees and USAF contributions were made. The finding on the merits is, accordingly:

(a) That Mr Karel Greeff has contravened the relevant 2011 Class licence Regulations read with the Notice in the Government Gazette (No 36008) dated

---

<sup>9</sup> 1990 (2) SA 277 (A).

<sup>10</sup> Translated: “a guilty mind”.

<sup>11</sup> Translated: negligence.

<sup>12</sup> See the Class regulations, the USAF Regulations and the Licence Fees Regulations in the Addendum to this judgment.

19 December 2012 by not having filed the 2011-2012 and 2012-2013 financial statements; and

(b) That he omitted to contribute to the USAF fund and omitted to pay licence fees for the said years.

Having found against Mr Greeff on the merits of the matter, it is the CCC's duty to advise Council of ICASA as to a fitting order against him as licensee.

#### **ADVICE TO THE ICASA COUNCIL AS TO AN ORDER**

**[8] In the light of the explanation given, the filing of statements up to 2014-2015 and the payment of all dues -**

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

The above order is legally enforceable.<sup>13</sup>



5 September 2016<sup>14</sup>

PROF JCW VAN ROOYEN SC

CHAIRPERSON

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

---

<sup>13</sup> See section 17H(1)(f) of the ICASA Act 2000.

<sup>14</sup> As a result of the fact that there had been no initial response from the licensee, his compliance was only finalised by late August 2016. This judgment was, accordingly, only finalised at the above date.

## **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.

[Sub. (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 instalations 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 sub-regulation (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 sub-regulation (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 (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.