

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

Date of Hearing: 7 March 2018

Case Number: 243/2017

**IN RE: KAWULEZA CONNECT (Pty) Ltd**

**PANEL:** Prof JCW van Rooyen SC  
Cllr Dr Keabetswe Modimoeng  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Prof Kasturi Moodaliyar  
Mr Jacob Medupe  
Mr Jack Tlokana

APPEARING before the CCC:

From Compliance Division of ICASA: Mr G Tshabangu

For the licensee: Attorney S Makda

From the Coordinator's Office: Ms Meera Lalla (Attorney).

CCC: Coordinator: Ms Lindisa Mabulu

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### JUDGMENT

**JCW VAN ROOYEN SC**

#### INTRODUCTION

[1] This is a matter which was referred in July 2013 by Compliance Division of ICASA in terms of section 17C of the ICASA Act 2000 (as amended in 2005) to the Complaints and Compliance Committee ("CCC") at ICASA. The Respondent is Kawuleza Connect (Pty) Ltd, which was issued with an

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<sup>1</sup> An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers an order in the light of the recommendation by the CCC. Once Council has decided on the order, the final judgment is issued by the Complaints and Compliance Committee's Coordinator.

Individual Electronic Communications Service Licence and an Individual Electronic Communications Network Licence effective from January 2009, signed by the Chairperson of ICASA at the time, Dr SS Mncube, on 22 September 2010. The matter was part of a substantial backlog of matters referred to the CCC in 2013 by the Compliance Division of ICASA. In some instances, alleged contraventions dated back to 2005. At the core of the references was the contraventions of Regulations, which required financial statements to be filed, fees to be paid and reports of not having become active in terms of the ECS and ECNS licences, as required by the relevant regulations.

[2] In accordance with section 17B(a) of the ICASA Act, the CCC must investigate, and hear if appropriate, and make a finding on (i) all matters referred to it by the Compliance Division of ICASA. Unless withdrawn by the Compliance Division of ICASA, the CCC must make a finding on the matter. In some instances, licensees had addressed the omissions before the hearing of the matter and it was, according to Compliance, not necessary for the CCC to issue more than a desist order. In such cases, the licensee was advised by the Coordinator that it was not necessary to appear before the CCC if it accepted a desist order. In the normal course, the matter was then dealt with by the CCC at a meeting when other matters were, in any case, before the CCC. A desist order is enforceable in terms of section 17H(f) of the ICASA Act.

### **CHARGE**

[3] The Licensee was charged for not having commenced services under the licences within 6 months (for the IECS licence) and 12 months (for the IECNS licence) as required by the relevant 2011 Regulations.

### **FINDING**

[4] Although the complaint before the CCC was that the licensee had not applied to the Authority for more time to become operational, there was also, in the documents filed, an allegation that it had not filed statements for the financial years 2006-7, 2007-8 and 2008-9, 2009-10 and 2010-11. All these alleged omissions fall within the period when the repealed regulations applied. These Regulations were repealed in September 2011.<sup>2</sup> In so far as the said financial

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<sup>2</sup> USAF = February 2011 and the other two, September 2012.

years are concerned, the CCC is not constitutionally empowered to hear the matter. The Constitution of the Republic of South Africa<sup>3</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>4</sup> This was not the case here.

[5] Insofar the year 2011-2012 is concerned, it was conceded by the Compliance Division of ICASA that a financial statement had been filed. In fact, a copy of the statement was made available to the CCC by the Respondent. The amounts owing to ICASA had also been paid and supporting documents were provided to the CCC. This also demonstrated that the licensee had been active for the year which was brought before the CCC.

### **OTHER MATTERS RAISED**

[6] Although these matters were not part of the charge before the CCC, the CCC raised questions as to the liquidation of the company and how the licences could have been included in the settlement package of one of the Directors, who had stepped down as Director. The licences were assets in the estate of Kawuleza and could probably not validly have been included in a separation package of one of the Directors. Ms Makda, appearing for the Respondent, argued that the settlement was not part of the charge before the CCC. Nevertheless, she undertook to file documentation in this regard within 20 working days. An affidavit by a past director of the Company was filed in response to the questions raised. For the record, the affidavit is included hereunder:

I the undersigned,

**MARTHA ARMSTRONG (Identity number: 550206 0024 08 0)**

Do hereby make oath and state as follows:

1. I am a former Director of the Respondent and am deposing to this Affidavit in my capacity as such.
2. The facts deposed to herein are true and correct and, save where the context may

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<sup>3</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>4</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.

indicate otherwise, fall within my personal knowledge.

3. I must note that the company had stopped trading in 2013, and has since been liquidated, with the liquidation having been finalised in 2016. Due to the time period that has passed, and the subsequent liquidation of the company, not all documentation and information is available at this time, and I have provided everything I've been able to gather at this time. Paragraphs 14 and 15 of the Complaint from ICASA - which is undated but appears to have been prepared in 2013 and is indicated in CCC Assessor's letter as having been sent to the CCC on 20 June 2013, but which was never received by me - indicate that the complaint is that the company had failed to commence operations within the specified time periods in the applicable regulations.
4. The letter from the CCC Assessor dated 9 October 2017 indicates that the company had violated regulation by failing to commence operations, failing to request and extension for the commencement of operations, and failure to provide reasons for the company's inability to commence operations.

#### **RESPONSE TO THE COMPLAINT**

5. The company took transfer of the IECNS and IECS licences on 22 September 2010. This is clear from the cover pages of the licences. The licences had previously been held by another company.
6. The company had commenced with the provision of licensed services immediately on taking transfer of these licences, and had paid the licence fees to ICASA confirming same.
7. Notwithstanding that some of these had been included in the case bundle, the CCC Panel had requested that I submit the records as sent for the 2010/2011 financial year and 2011/2012 financial year.
8. I have accordingly attached the documentation sent to ICASA for the 2011/2012 financial year, which includes the financial statements, the calculations and the proof of payment.

9. I have also attached an email showing that documentation were sent to ICASA for the 2010/2011 financial year. I have not yet been able to retrieve the full records as attached to this email, but it's clear from the email that I was interacting with ICASA in this regard.
10. As is clear from the above, the company had been operational and had been paying its licence fees at the time of the Complaint.

#### **OTHER MATTERS**

11. The CCC Panel raised other matters during the hearing. I note that, in terms of a previous decision of the CCC in IN RE: ICT-WORKS (Pty) Ltd of 10 March 2017, the CCC noted that:

*It is true that the CCC has an investigative function, but that does not mean that it may add a charge to the charge sheet during that investigation. It may, in any case, only exercise that investigative function within the rules of fairness, according to the Constitutional Court. Fairness would not permit such an addition, which flies in the face of legality as referred to by the Supreme Court of Appeal, as cited above.*

12. While I had provided additional information to the CCC Assessor to indicate the direction of the company when it ceased trading, I must stress that this does not form part of the Complaint at hand.
13. While also not relevant to the Complaint, I will respond to the additional queries raised by the CCC Panel to the extent that I am able to do so.

#### **Failed transfer**

14. During the course of the investigation, I indicated to the CCC Assessor that the company had been liquidated, and that there had been an attempt to transfer the licences in 2014 in terms of a Settlement Agreement concluded in November 2013, which transfer was unsuccessful as we did not receive an invoice for payment of the licence transfer application fee or any communication from ICASA on the intended transfer.

15. The transfer was accordingly not finalised, and the transferee had not operated in terms of the licences. It had been intended to transfer the licences to Mr Clint Armstrong in settlement of monies owing to him as a retrenchment package, which were not capable of being paid to him. The company was first given an opportunity to make payment of the monies owing to Mr Armstrong, and if this was not done the company would support Mr Armstrong in applying for the transfer of the licences.

16. The monies owing were considered fair market value for the licences, and is what the company would likely have received if selling the licences to a third party. The Settlement Agreement is clear that the cession of the licences was considered fair and reasonable in relation to the monies owing to Mr Armstrong.

17. The Settlement Agreement and some of the documentation related to the transfer had been included in the case bundle.

18. We note that the company had not failed due to any actions on the part of the management or its employees, but due to the decisions by the 70% shareholders of the company to cease all operations and liquidate its holdings following the death of its CEO in 2013 and their lack of funding for the company.

#### **Other Assets**

19. The company also entered into a Sale and Lease Agreement with **WINN** Developments CC in order to raise funding to meet its financial and operational obligations. This related to other assets held by the company at the time.

20. The agreement and documents relating to same were also provided to the CCC Assessor.

#### **Relationships**

21. The Settlement Agreement noted above had been signed by both myself and another director of the company, as had the Resolution relating to this decision, and we were both authorised to do so on behalf of the company. Both of these had been provided to the CCC Assessor.

22. The CCC Panel had raised the relationship between myself and Mr Armstrong at the time the Settlement Agreement and the failed transfer. I would like to submit that our relationship is immaterial; I had been acting as a director of the company, and with the appropriate authorities to do so and with the relevant considerations to my role as director of the company. In addition to this, I did not act alone, as evidenced by the fact

that the Settlement Agreement was signed by another director as well. Nevertheless, in the interest of transparency and to fulfil the CCC Panel's request, I record that Mr Armstrong and I had been divorced since 2005, and had not been married at the time of Settlement Agreement and the failed transfer. I had provided this information to the CCC Assessor in the course of our discussions as well.

### **Liquidation**

23. The company had ceased trading in November 2013, and a liquidator was appointed in 2014. I had provided the liquidator details to the CCC Assessor.

24. The liquidation of the company was finalised in 2016.

25. While the CCC Panel has requested details from the appointed liquidator as to their intentions relating to the licences, it is not possible to get this as the liquidators have finalised their work. In order to secure this, liquidators would need to be re-appointed by the Master of the High Court.

### **Future of the licences**

26. As noted above, the liquidation of the company has been finalised. Mr Armstrong is no longer interested in taking transfer of these licences. If ICASA and the CCC are amenable to same, and with ICASA's guidance on how this should be done, we could consider transferring the licences to a third party who would benefit from the licences. There are no current plans or intentions in this regard.

27. The number range 087 910 0000 to 087 910 0999 had been issued on these licences by ICASA. At the time of cessation of trading and liquidation, some of these numbers were being used by customers. These customers were taken over by another licensee, in order to ensure that the customers could continue to utilise the numbers allocated to them and to receive voice services. There had been no process in place for the transfer of these numbers at that time, which process has only been introduced in recent regulations. I am currently gathering the information and documents needed in order to assist this licensee to apply for the transfer of these numbers, as they are currently providing services on these numbers. If this is not possible, I will assist this licensee in looking at options to port these numbers, with the customers' consent. I will be in touch with ICASA's Numbering Division and assist the licensee as needed to ensure that these customers can keep their numbers and have no issues with their service.

## **CONCLUSION**

I trust that I have provided the necessary information and documents to respond to the Complaint to the satisfaction of ICASA and the CCC, so the CCC can make an appropriate ruling on this. I trust that I have also addressed the queries raised by CCC Panel which did not relate to the Complaint.

SIGNED at **CAPE TOWN** on this the 7TH day of **APRIL 2018**. **MARTHA ARMSTRONG**

[7] As would appear from the above affidavit by a director, the questions raised were satisfactorily answered. The *bona fides* of the settlement was also clear. In any case, the licences have not been transferred and, as conveyed by Ms Makda, the Respondent's directors were aware of the requirements of ICASA in regard to the transfer of licences. The settlement was also co-signed by another director.

[8] The omission to make the licences operational fell under the pre-September 2011 Regulations, under which a charge could no longer be brought in terms of the September 2011 Regulations. In any case, the licences had been made operational, as appeared from the 2011 – 2012 financial statement filed at the time. The new 2011 Regulations had, thus, been complied with. All amounts owing to ICASA had also been paid. Thereafter, the company was finally liquidated for reasons set out in the above affidavit.

## **LIQUIDATION**

[9] Since Kawuleza Connect (Pty) Ltd has been liquidated by the High Court in 2016, the question arose whether the Council of ICASA should not be advised to cancel the licences. A settlement agreement with an ex-director, Mr Armstrong, included the licences, but it was conceded that Mr Armstrong was not interested in activating these licences. For all purposes, the licences, in any case, remained as assets in the estate of Kawuleza and ICASA had not granted permission for the transfer of the licences.

Section 14 of the ECA provides as follows:

### **14. Suspension or cancellation of individual licence**

- (1) The Authority may suspend or cancel an individual licence granted in terms of this Act -
  - (a) where the licensee agrees in writing to such suspension or cancellation;
  - (b) in accordance with a decision made by the Authority in terms of section 17E of the ICASA Act; or



- (c) where the licensee is placed in liquidation, whether voluntary or compulsory or is placed under judicial management, either provisionally or finally.
- (2) The suspension or cancellation of an individual licence takes effect on the date set forth in a written notice of suspension or cancellation served on the licensee by the Authority.
- (3) Once the suspension or cancellation of an individual licence has taken effect, the Authority must, as soon as practicable, publish the suspension or cancellation in the *Gazette*.
- (4) A delay or failure to publish the notice of suspension or cancellation in the *Gazette*, does not in any manner affect the validity of the suspension or cancellation.

No reason has been put forward as to the future of these licences. The estate of Kawuleza has been liquidated and the liquidator has concluded her or his functions. The settlement, which included the licences, did not lead to anything. In any case, any transfer of a licence must first be approved by ICASA. No application was lodged for the transfer of the licences and, whatever the settlement agreement provided, the fact of the matter is that the holder of the licences has been liquidated. It no longer exists. It is not in the public interest that licences to provide services to the public become inactive with no clear plan to activate them.

The CCC has, accordingly, decided to advise the Council of ICASA to cancel the licences in terms of section 14(1)(c) of the ECA.

## **RESULT**

The outcome of this inquiry by the CCC is, accordingly, as follows:

1. The licensee no longer exists since it has been liquidated by the High Court.
2. No contravention of the relevant Regulations is found. The licensee filed its last financial statement and had paid its dues to ICASA.
3. Its inactivity after that was satisfactorily explained.
4. The advice to the Council of ICASA is to cancel the licences in terms of section 14 of the ECA, as quoted above. And, accordingly, in terms of section 14(3) of the ECA publish this cancellation in the Government Gazette.

## ADVICE TO COUNCIL

**To confirm the advice by the CCC to cancel the licences issued to Kawuleza Connect (Pty) Ltd and publish the Notice hereunder in the Government Gazette.**

The Individual Electronic Communications Network licence (No. 0053/IECNS/Jan/09) and the Individual Electronic Communications Licence (No. 0053/IECS/JAN/09) issued on 16 January 2009 by the Independent Communications Authority of South Africa, in terms of the Electronic Communications Act 36 of 2005, to Kawuleza Connect (Pty) Ltd, are declared, in terms of section 14 of the Electronic Communications Act 2005, to expire on the date that this cancellation is published in the Government Gazette.

Motivation: The licensee, Kawuleza Connect (Pty) Ltd, was placed in final liquidation by the High Court in 2016. Section 14 of the Electronic Communications Act 2005 authorises the Independent Communications Authority of South to cancel a licence granted in terms of the Electronic Communications Act if the licensee has been liquidated.

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Rubben Mohlaloga

Chairperson of the Council of ICASA



JCW van Rooyen SC

Date: 11 May 2018

Chairperson of the CCC

The Members agreed with the above advice to Council as to an order.

