

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

Date of Hearing: 10 March 2017

CASE NUMBER 218/2016

IN RE: LIMPOPO ECONOMIC DEVELOPMENT AGENCY (“LIMDEV” now “LEDA”)

**PANEL:** Prof JCW van Rooyen SC  
Councillor Nomvuyiso Batyi  
Mr Jacob Medupe  
Ms Nomfundo Maseti  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana  
Ms Mapato Ramokgopa

From the Respondent: B Ramasobane (Acting CEO) and with him H Lubisi, R Ledwaba and P Mpatha. In attendance from the Office of the Coordinator: Adv L Myeza; from Compliance Mr M Nkosinkulu; Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND AND CHARGE BEFORE THE CCC

[1] On 28 April 2010 Limpopo Economic Development Enterprise (Trading as LIMDEV and *now* known as LEDA) was issued with an Individual Electronic

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<sup>1</sup> 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.

Communications Service Licence and an Electronic Communications Network Service Licence by the Independent Communications Authority of South Africa (“ICASA”). LIMDEV has since been amalgamated with other provincial parastatals to form the Limpopo Economic Development Agency (“LEDA”). The licences were transferred to LEDA by a previous managing director. In the process of amalgamating the entities, it was explained by Mr Ramasobane at the hearing of this matter, the licences were not understood correctly – hence the delay in the implementation of the broadband policy for the Limpopo Province. The licences were also overlooked in the process of handing over to new management.

[2] Compliance (Licensing), which has a delegated monitoring function under the supervision of the Chief Executive Officer of ICASA,<sup>2</sup> and had not been kept up to date with the developments in regard to the licences, referred this matter in 2013 to the Complaints and Compliance Committee (“CCC”), alleging that LIMDEV had not filed financial statements for the years 2010-2011, 2011-2012, 2012-2013, and thus also had not paid its USAF contribution and licence fees. Presently LEDA has taken steps, in the light of the broadband policy for the Limpopo Province, to implement the said policy.

### **APPLICABLE LAW**

[3]The Standard Terms and Conditions for Class Electronic Communications Services 2010 (made operational on 12 September 2011) 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 said September 2010 Regulations. 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> Thus, only the omissions to file financial statements for the years 2011-2012 and 2012- 2013 as well as the omissions to pay USAF fees and licence fees for these years are before the CCC. Licence fees are, according to the

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<sup>2</sup> See section 4(3)(b) of the ICASA Act read with section 4(4)(a)(iii) of the same Act.

<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.

relevant regulations, only applicable in cases where the turnover was larger than the prescribed amount. USAF fees are, of course, also only payable if there had been income from the licences.

[4] On 16 September 2011 ICASA issued a General Notice in the *Government Gazette* calling upon all licensees to furnish annual financial statements to ICASA and to further provide proof of payment of USAF and general licence fees for the period 2011/12. This notice further informed licensees of the interest and late penalty which would be levied on any USAF payments after the prescribed period. It also instructed licensees to provide their latest contact details to ICASA. In April 2012 ICASA issued a further General Notice in the *Gazette* calling upon licensees to submit their audited financial statements or financial statements signed and sworn to by its accounting officer for the 2012-2013 compliance assessment term. Licensees were also informed that, if they had not commenced operations, they were “kindly” requested to submit a formal letter stating that they had not commenced operations. These notices were copied on the website of ICASA.

[5] It is not denied by LEDA that there had been an omission in regard to filing financial statements, but there had been no activity in terms of the licences. However, there was no indication, even in the April 2012 *Government Gazette* that it would amount to a *contravention* not to inform the Authority of inaction under the licences. It must, however, be pointed out that the Regulations have, in 2016, been amended. The relevant provision is:

**5. Commencement of operations**

A Licensee must commence operation of the BS 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.

This amendment, of course, does not have retrospective application, but will have application to any licensee who or which is not operational at the date of the said amendment, which was 30 March 2016.<sup>5</sup> In the circumstances it should

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<sup>5</sup> Gen N 155 GG 39872 20160330

not be held against LEDA, since, as explained, there had been no accent on the licences as such, but planning had taken place. There was, accordingly, no intentional contravention of the said amended regulation and, in the CCC's view, there was accordingly no contravention. In any case, the activities of LEDA after the 2012-2013 financial year was not the subject of the present matter before the CCC. And, at that time, the above quoted regulation was not yet on the statute book.

## **FINDING**

[6] The CCC's finding is, accordingly:

6.1 The omission to file financial statements for the years 2011-12 and 2012-2013 does not amount to a contravention of the relevant regulations, since there was no activity in terms of the licences.

6.2 The omission to inform Compliance (ECS and ECNS) at ICASA of the non-activity under the licences during the above periods (2011-2013) was also not a contravention.

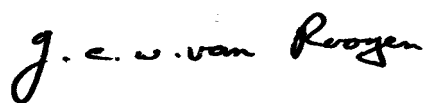
## **ADVICE TO COUNCIL AS TO ITS FUNCTIONS IN TERMS OF SECTION 17B(b):**

[7] Although the Respondent has satisfactorily explained what its plans are as to the use of the licences, Council is advised to direct Compliance (ECS and ECNS) to ensure that the licensee also *formally* complies with the following regulation within 30 working days from the issue of this judgment :

### **5. Commencement of operations**

A Licensee must commence operation of the BS 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.

Of course, if it has, at the time of the issue of this judgment, already complied with the said Regulation 5, then no such application would be necessary.



PROF JCW VAN ROOYEN SC

5 April 2017

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the recommendation to Council in terms of section 17b(B)

