

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

Date of Hearing: 10 February 2017

Case number 179/2016

**IN RE: MGM TELECOMS (PTY) LTD**

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

Ms Carol Mhlongo from Compliance.

From the Coordinator's Office: Attorney Meera Lalla; Coordinator: Ms Lindisa Mabulu.

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On the 27<sup>th</sup> July 2010 the Independent Communications Authority of South Africa ("ICASA") issued a Class Electronic Communications Service Licence and a

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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. The order of Council is enforceable in terms of section 17H (1)(f) of the ICASA Act.

Class Electronic Communications Network Services Licence to MGM Telecoms (PTY) Ltd (“MGM”).

[2] ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013 to the Complaints and Compliance Committee at ICASA (“CCC”), alleging that MGM had not commenced business and had not applied to ICASA for permission to commence at a later stage. On the 31<sup>st</sup> August 2016 Ms Carol Mhlongo from Compliance confirmed to the Coordinator of the CCC that MGM had not taken steps to notify the Authority that it had not become operational in terms of its licences and had not applied for an extension. According to the Class Regulations 2010, which became effective in September 2011, it amounts to an offence not to apply for such extension. In fact, the omission to apply for such an extension may lead to a substantial fine. The Regulation applicable to the present matter provides as follows:

A Licensee must commence operation of the ECS specified in the Licence within twelve 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 months period.

This provision was amended on 30 March 2016 to read as follows:

**5. Commencement of operations**

A Licensee must commence operation of the service specified in the Licence within twelve 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 months period.

The above 30 March 2016 amendment amounts to a slight amendment in the wording. However, the maximum fine is increased to R200 000. This increase demonstrates the importance of this regulation. However, since the charge was referred to the CCC in 2013, the above amendment is not applicable to the present matter.

[3] On 4 July 2016 MGM responded as follows to the charge:

1. The entity has been unable to secure funding from parties to undertake the project.
2. Per the attached financial statements for 28 February 2012 to 28 February 2015 the entity has continued to sustain financial losses that the shareholders and related entities could not afford to sustain.
3. The entity has tried to enter into joint agreements with I-Burst but final agreements have not been forthcoming.
4. The entity commenced operations in conjunction with UGU District Municipality to provide wireless services to the UGU district. The contract was terminated due to the municipality not wishing to extend the project.
5. Extensions have not been requested as there is no practicable chance of obtaining sufficient financing to make the project viable.
6. Kindly consider the above facts as to reasons for non-compliance with commencement of operations and we respectfully request that you consider not levying a fine for this contravention.

If you require anything further do not hesitate to contact myself.

Regards

Loyiso Godlwana (signed)

Director- MGM Telecoms (Pty) Ltd

## **NON ACTIVITY**

[4] In contrast to almost all the matters that have been referred to the CCC in 2013, as part of a back-log, the present charge is directed at MGM's not having applied for an extension. It was copied in 2013 with the reference to the CCC. On 31 August 2016 Compliance (ECS and ECNS) at ICASA confirmed that there had not, in the interim, been an application for extension. For the first hearing on 24 November 2016 the CCC was informed that a representative from MGM had missed his flight and could, thus, not attend the hearing. The date for the hearing was then extended to 11 February 2017. Once again a representative from MGM did not turn up. The Coordinator's Office informed the CCC that the representative had forgotten about the hearing.

## **FINDING ON THE MERITS**

[5] A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Wag lines Pty Ltd and Another*<sup>2</sup> Judge Didcot held that "ignorance of or mistake about the law is cognisable by the courts only

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<sup>2</sup> 1986(4) SA 1135(N).

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. Cf. *S v Long-distance Natal Pty Ltd*<sup>3</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Mens rea*<sup>4</sup> in the form of *culpa*<sup>5</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. (C *S v De Bloom* 1977 (3) SA 513 (A) at 532G.)

In the present matter the licensee had been made aware of the omission to apply for an extension. No steps were taken to comply by the time this matter was placed before the CCC in February 2017.

## **FINDING**

**[6] The charge against MGM Telecoms (Pty) Ltd for not having applied for an extension as to becoming operational is upheld.**

## **ORDER ADVISED**

**[7] The CCC has come to the conclusion that in spite of the fact that the Licensee was clearly aware of the fact that it must apply for an extension, it had not done so. In the circumstances it has been decided to advise Council to issue the following order:**

**That MGM Telecoms (Pty) Ltd be fined R2500 (Two thousand five hundred Rand) for not having applied for an extension as to becoming operational in**

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<sup>3</sup> 1990 (2) SA 277 (A).

<sup>4</sup> Translated: a guilty mind.

<sup>5</sup> Translated: negligence.

**terms of its licences. This amount must be paid to ICASA within sixty calendar days from the date that this judgment is issued by the Council of ICASA.**

MGM Telecoms (Pty) Ltd is once again informed about its duty to apply to ICASA for an extension, if it has not yet done so at the issue of this judgment. It is granted thirty calendar days from the date that this judgment is issued by Council to do so on the form which is available at Compliance (ECS and ECNS) ICASA.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

6 May 2017

The Members of the CCC agreed with the finding and order advised to Council.