

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 25 November 2016

CASE NUMBER 183/2016

IN RE: MBHURI INVESTMENTS (PTY) LTD

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

From the Coordinator's Office: Adv L Myeza
Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On the 15th January 2009 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 Mbhuri Investments (Pty) Ltd (“Mbhuri”).

[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 Mbhuri had not filed financial statements for the years 2008-2009 and 2011-2012. No mention was made about the years in between. We accept that no statements were filed for those years as well. The CCC does not have jurisdiction in regard to the years before 2011-2012, in any case – we will get back to that. 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 A letter was also sent to the licensee in regard to the year 2008-2009. 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.

[3] The September 2011 Regulations, in accordance with which Government Notices were issued requiring licensees to file financial statements, do not have 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 February and September 2011 Regulations. The Constitution of the Republic of South Africa 1996⁵ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still

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.

⁵ 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].

in operation.⁶ The allegation of omissions was sent by Compliance to the CCC Coordinator in 2013, with a copy to Mbhuri and only referred to the said financial year 2011-2012. Thus, 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] After the first email from the Coordinator of the CCC was sent to Mbhuri in June 2016 an answer was received from Mbhuri's Ms Makhubele, a director of the company, dated 29 June 2016. The latter attached a letter from Mbhuri's Accountants, D Kalmin & Company, confirming that Mbhuri had not traded in terms of the licences during the financial years 2010-2011, 2011- 2012 and 2012-2013. In fact, as it surfaced at the hearing, has never traded under the licences.

[5] At the hearing of this matter Ms Makhubele, a director, explained that although certain work was done through a sister company, Mzumbe-Ekhaya, of which she was also a director, the work did not amount to the exercise of the said licences. She pointed out that the said company had been appointed to be part of a project by the Universal Service and Access Agency Fund of South Africa. The matter is, presently, subject to litigation between Mzumbe-Ekhaya and USAASA. We need not go into that matter. At the hearing Ms Makhubela was requested to file confirming documentation that Mbhuri and Mzumbe-Ekhaya are separate companies and that Mbhuri was not, in any manner, been acting in terms of its licences. The fact that the companies are separate companies was confirmed in a letter after the hearing. In any case, as pointed out above, the accountants of Mbhuri confirmed that Mbhuri had not been active in terms of its licences.

[6] Mbhuri, however, confirmed, that it had not informed ICASA as to its non-activity in terms of its licences. The above mentioned *Government Gazettes* relating to the years 2011 and 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

⁶ 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.

to inform ICASA if they were not active under their licences. The present complaint does not relate to the latter year. The CCC cannot, in any case, add to the charges before it – these relating 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). Ultimately the CCC must, also, of course, act within its powers in accordance with the principles of constitutional legality. Thus, Navsa JA states 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 compare 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

As appears from the previous paragraphs, Mbhuri has not been active in terms of its licences. No duty, accordingly, arose to file financial statements for those years.

Since Mbhuri 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.

The charges are, accordingly, not upheld.

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

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, Council is advised to instruct Compliance (ECS & ECNS) at ICASA to require Mbhuri (Pty) Ltd to file the formal documentation as to non-activity with that Division within 30 calendar days from when this judgement is released, if Mbhuri (Pty) Ltd has not already done so after the hearing of this matter on the 25th November 2016.



PROF JCW VAN ROOYEN SC

CHAIRPERSON

10 December 2016

The Members of the CCC agreed with the finding.