

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 27 May 2016

CASE NUMBER 147/2015

IN RE: EOH MTHOMBO TECHNOLOGIES (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Clr Keabetswe Modimoeng
Prof Kasturi Moodaliyar
Mr Jack Tlokana

For the Respondent: adv. H Smith instructed by Wynand Du Plessis Inc (Mr Anton Kotzé in attendance) with adviser Ms Sumaiyah Makda

From Compliance (Licences and Compliance, ICASA) Mr Godfrey Maulana, Ms Carol Mhlongo and Ms N Makhubu

In attendance from the Office of the Coordinator: Meera Lalla

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 16 January 2009 EOH Mthombo (Pty) Ltd (“Mthombo”) was issued with an Electronic Communications Network Services Licence and a Class Electronic Communications Service Licence by the Independent Communications Authority of South Africa (“ICASA”). The licences replaced an earlier licence

¹ An Independent Administrative Tribunal 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.

issued to a different company, Ensync Network Solutions (Pty) Ltd, in 2007. The said licence was transferred to Mthombo in 2009. The Compliance Division (ECS and ECNS licences) of ICASA (“Compliance”), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”) at ICASA, alleging that Mthombo had not filed financial statements for the years ending 2008 and 2009 and not paid USAF fees and licence fees.

[2] *In limine* Mr Smith argued that the 2008 and 2009 alleged contraventions referred to periods when the licence was held by Ensync Network Solutions (Pty) Ltd. The licence was transferred to Mthombo in 2009 and, accordingly, Mthombo could not be held liable for the debts of its predecessor.

[3] Mr Maulana from Compliance argued that USAF and licence fees were objectively connected to a license and that even if the identity of the licensee changed, that a later licensee would be liable for those USAF and licence fees of its predecessor. He based this argument on section 5(12) of the Electronic Communications Act which provides as follows:

- (12) A licence confers on the **holder** the privileges and subjects him or her to the obligations provided for in this Act and specified in the licence.(accent added)

The sub-section, however, makes it clear that the *holder* is responsible for the obligations. There is no indication that a holder would be responsible for debts which a previous holder of that licence did not pay.

This interpretation is borne out by the regulation 4 of the USAF Regulations (as copied in an addendum), which provides as follows:

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.

These regulations personalise the amount payable to the turnover of a particular licensee.

The Licence fees Regulations, as copied in an addendum to this judgment, do not show a different result. They also hold the *holder* of the license responsible. There is no indication that the debts of past holders would be to the account of the present or later licensee.

[4] Our conclusion is, accordingly, that the responsibility to pay USAF fees and licence fees is that of the particular holder at the time. The debts do not attach to the licence as such, but are those of the particular licensee. This conclusion is supported by the judgment of Fourie J in *Mitchell v City of Tshwane Metropolitan Municipal Council* 2015(1) SA 82 (GP). Although that judgment deals with municipal debts of an earlier owner of the property which, according to the learned Judge, do not attach to the property, the *principle* is, at least, also applicable here. In so far as Fourie J refers to a hypothec over a property in favour of a municipality, that hypothec resulted from legislation, which is not applicable in the present matter. In any case, according to Fourie J, such a hypothec must be exercised by the Municipality when transfer takes place, otherwise it falls away.

[5] There is, however, also a second hurdle to the argument of Compliance. 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 and 2009 financial year 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 Africa² does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.³ The allegation of omissions was sent to the licensee by the CCC Coordinator in October 2015.

[6] Thus, only omissions to file financial statements for the years ending February 2012, 2013 and 2014 could have been brought before the CCC. As matters turned out, the referral from Compliance to the CCC Coordinator, limited the charges to 2008 and 2009 year-ends. The CCC is not permitted in law to add an alleged contravention to the referral.⁴

[7] The result is:

(a) that the charge before the CCC that payments were owing for the 2008 and 2009 financial years and that EOH Mthombo (Pty) Ltd had thus contravened the relevant 2011 regulations is dismissed on the basis that there was no debt owed by EOH Mthombo (Pty) Ltd; and secondly

(b) that even if such a debt existed, the 2011 Regulations are, in any case, not applicable to the years in question, since it does not have retroactive effect.



9 June 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding.

Addenda with Regulations attached.

² 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].

³ 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.

⁴ 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). See the CCC judgment in *Integrat* (112/2015) where this principle was applied.

USAF REGULATIONS, 2011

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.

ICASA GENERAL LICENCE FEES REGULATIONS, 2012

Published under General Notice 299 in *Government Gazette* 36323 of 28 March 2013 and amended by ICASA

Schedule

1. Definitions

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Electronic Communications Act, 2005 (Act No. 36 of 2005) has the meaning so assigned;

“the Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

“Accounting Officer” means the Chief Financial Officer (CFO) or alternatively the executive in charge of financial management of the licensee, or equivalent;

“Administrative fees” means the fees payable in terms of regulation 3(2) and contained in Schedule 1;

“Annual Licence fees” means the fees payable in terms of regulation 3(1) and contained in Schedule 2;

“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;

“Licensed Service” as defined in the Electronic Communications Act under “broadcasting service”, “electronic communications service” and “electronic communications network service”, and as contained in the relevant licence;

“Revenue” means Revenue as defined in terms of the International Accounting Standard 18 and disclosed in the Licensee's audited Annual Financial Statements, i.e. the gross inflow of economic benefits during the period arising in the course of the ordinary activities of the entity when those inflows result in an increase of equity other than increases relating to contributions from equity participants.

2. Purpose of these regulations

The purpose of these Regulations is to prescribe -

- (a) the administrative fees payable in respect of an application or registration for a licence, amendment, transfer or renewal as contemplated in sections 4(1c)(iv) and 4(1)(c)(v) of the Act; and
- (b) The annual licence fees payable by licensees as contemplated in section 5(7)(a)(iii) of the Act.

3. Application

- (1) The annual licence fees prescribed in these regulations and as set out in schedule 2 apply to **holders** of individual and class ECS Licences, individual and class ECNS Licences and individual commercial BS Licences.
- (2) The administrative fees are as set out in schedule 1 and:
 - (a) The method of payment prescribed in the Process and Procedure regulations as published in the *Government Gazette* 30916 and Notice 397 in *Government Gazette* 30914 dated 31 March 2008 applies; and

- (b) May be adjusted by a maximum of the Consumer Price Index (CPI) as published by Statistics South Africa, effective on 1 April of each year.

4. Exemptions

The following Licensees are exempt from the payment of annual licence fees:

- (a) Class Licences for Community Broadcasting (Sound); and
- (b) Public Broadcasting Services.

5. Payment of annual licence fees

Payments in respect of annual licence fees are due as prescribed in schedule 2 and 3.

6. Interest

Interest on all late payments in respect of the annual licence fees is payable in accordance with the Public Finance Management Act, Act 1 of 1999, as amended (PFMA), at the applicable interest rate as published by the Minister of Finance.

7. Contraventions and penalties

- (1) Failure to pay the annual licence fees will result in the suspension of the licence issued by the Authority in terms of Chapter 3 of the Act until such time that the annual licence fees, plus interest, are paid in full.
- (2) Failure to comply with any other provision in these regulations will result in a fine not exceeding one million rands (R1 000 000.00).

8. Short title and commencement

- (1) These regulations are called the ICASA General Licence Fees Regulations, 2012.
- (2) These regulations shall come into effect on 1 April 2013.

9. Repeal

- (1) In the event of any conflict between the provisions of this regulation and the licence terms and conditions which purports to impose Annual and/or Licence Fees, the provisions of this regulation prevail.
- (2) The ICASA General Licence Fees Regulations, 2009 are hereby repealed.

SCHEDULE 1

ADMINISTRATIVE FEES

[Schedule 1 substituted by Gen N 151/2016 and duplicated in Gen N 187/2016]

SCHEDULE 2

ANNUAL LICENCE FEES

SCHEDULE 3

PAYMENTS IN RESPECT OF LICENCE FEES