

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

DATE: 16 March 2017

CASE NUMBER: 192/2016

## IN RE: NETWAVE INTERNET

PANEL: Prof JCW van Rooyen SC  
Councillor Nomvuyiso Batyi  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana  
Ms Mapato Ramokgopa

Matter prepared by CCC Assessor Mr T Mtolo

Coordinator: Ms Lindisa Mabulu

---

## JUDGMENT

### JCW VAN ROOYEN SC

### BACKGROUND AND COMPLAINT

[1] On 27 August 2009 Netwave Internet was issued by the Independent Communications Authority of South Africa (“ICASA”) with an Individual Electronic Communications Network Licence and an Individual Electronic Communications Network Services Licence. In June 2013 Compliance (ECS and

---

<sup>1</sup> An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) Act 13 of 2000. 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 from outside ICASA or references from within 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 is dismissed the decision is final and only subject to review by a Court of Law. Where a complaint 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 as to sanction by the Complaints and Compliance Committee, further reasons are not issued. Of course, copies of the final judgments is sent to the parties to the matter and is a public document. The final judgment is, once again, on application subject to review by a Court of Law. ***The present matter does not relate to a sanction, but amounts to an advice by the CCC to Council in terms of section 17B(b) of the ICASA Act 2000.***

ECNS Licenses) at ICASA referred the matter to the CCC Coordinator, as part of a substantial backlog of alleged contraventions by licensees. It was alleged that *Netwave* had not filed financial statements and not paid USAF contributions and licence fees for the financial years 2009-2010 to 2012-2013. Notwithstanding the fact that a diligent search as to the whereabouts of the licensee was conducted by Compliance, the Coordinator's Office and the ICASA Inspectorate, no trace of the shareholders could be found. These licences were, accordingly, placed before the CCC so as to decide whether to advise Council to make a declaratory order that it no longer traded or had never traded in terms of its licences as issued to it by ICASA – and thus that the licences be revoked.

[2] Despite ICASA notices in 2011 and 2012 *Government Gazettes* (duplicated on the ICASA Website) reminding licensees to file Annual Financial Statements for the years 2011-2012 and 2012-2013 as well as a personal email from Compliance (ECS and ECNS) dated 9 May 2013, there was no reaction from the licensee. In fact, the "Postmaster" confirmed that the email from Compliance at ICASA could not be delivered since the domain was apparently invalid or the email address (as provided by the applicant when the licences were applied for) was incorrect.

[3] The Standard Regulations concerning Individual Licences 2010 (made operational in September 2011) require a licensee to apply to the Authority if it is unable to become active in terms of the licence within 6 or 12 months.<sup>2</sup> The different time periods are based on whether it is a network licence or not. In the present matter, two licences had been issued in 2009. A substantial fine may be imposed if an application for extension is not lodged within the period of six or twelve months.<sup>3</sup>

[4] Several attempts were made by the Coordinator's Office to obtain a response from the licensee to the allegation of non-compliance. At the core of the matter was the question whether the licensee was or is active in terms of its licence. Attempts were made to reach the licensee on its email address, its

---

<sup>2</sup> See the attached 2010 Regulations. The Regulations were amended in 2016. The amendments, however, do not apply to the present matter since the alleged omissions related to the years 2011-2012 and 2012-2013.

<sup>3</sup> See the attached 2010 Regulations.

landline and the mobile phone of the contact person indicated in the license. However, there was no response and the landline response indicated that the number did not exist. The ICASA Inspectorate established, at the erstwhile premises of the licensee, that the licensee had sold the business seven years previously and that the company was no longer operating. This information was gained at the erstwhile premises of the licensee from the sister of the main shareholder, Ms Leslie Wang, who is not indicated as a shareholder on the license.

### **APPROACH TO THESE MATTERS**

[5] The approach of the CCC in similar cases, which came before it in 2015 and 2016, was that ICASA should not readily accept that a licensee has not commenced operations or that it is no longer operational, without notice. This cautionary approach is based on what Judge of Appeal Navsa stated in *MEC for Social Development v Mdojisa* 2010 (6) SA 415 (SCA):

It is clear that one cannot confidently deduce from what was stated by Ms Mpunzi that any of the actions contemplated in s 3(2)(b) of PAJA to give effect to procedurally fair administrative action were taken by anyone in the MEC's department, either in relation to the initial decision concerning the nature and duration of the grant, or in respect of its termination. On the contrary, one is constrained to *accept M's assertion, as the court below did, that she received no communication from the department indicating the nature and duration of the grant, and that she was made to believe that the grant was a permanent one, subject only to annual statutory review. It is equally clear that there was no communication about its termination, nor was an opportunity provided to M to make representations before the grant was terminated.* (Italics added)

### **CONCLUSION**

[6] In the light of the approach in the above matter, the CCC, through its Coordinator, has been at pains to undertake a solid inquiry into claims that a licensee has never commenced to operate or ceased operating without notice to ICASA. The CCC is satisfied that the Coordinator's Office and the Inspectorate have undertaken such an investigation in the present matter and is convinced that there is no reliable evidence that the licensee commenced business within the prescribed terms of six months and twelve months. Furthermore, that all reasonable steps have been taken to establish whether

the licensee still exists or might have commenced operations. The conclusion is that there is no reliable evidence that the licensee commenced business or applied for leave from ICASA to commence business at a later stage. The whereabouts of the shareholders of the licensee could also not be established. There is no reason to doubt the evidence of the sister of the majority shareholder that the business was sold seven years ago. Whether the licences were included could not be established. There is, in any case, no evidence that a transfer of licences had been effected.

### **ADVICE TO COUNCIL**

[7] This is not a case where the CCC is advising Council as to a sanction in terms of section 17E(2) of the ICASA Act. The ultimate order would be in the nature of a declaratory order by Council that operations did not commence or have ceased. The CCC's decision, effectively, amounts to an advice to Council as to its functions in terms of section 17B(b) of the ICASA Act. One of Council's powers is, in terms of section 4(3)(e) of the ICASA Act, to revoke licences. In the normal course a revocation of a licence may only take place after an inquiry by the CCC and an advice to Council that the licence may be revoked as a sanction, following upon repeated findings of material breaches of its licence – see section 17E(2)(d) of the ICASA Act.

[8] However, in the present case it is clear to the CCC that a hearing cannot be held, simply because there is no trace of the licensee. Also that it is reasonably clear that licenses were never made operational. Accordingly, the CCC is left with no other option but to advise Council that there is no evidence that the licensee still exists or has become operational or, if it had become operational, there is no evidence that it is still operational.

[9] The authority of Council to revoke a licence would, in the CCC's view, also include the authority to declare that a licence no longer exists. The function of such an order is to ensure certainty within this economic sphere and protect the public against licensees which have ceased operating formally or simply ceased having contact with ICASA. Such a notice by Council should be formal and the only manner to achieve that, would be to place a notice in the

*Government Gazette* with a copy on the website of ICASA for the sake of information.

**ADVICE TO COUNCIL AS TO ITS FUNCTIONS IN TERMS OF SECTION 17B(b) OF THE ICASA ACT**

That the Council of ICASA makes the following declaratory order and that it directs that the following Notice in the *Government Gazette* and on the ICASA Website be published.

**INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

**NOTICE OF DECLARATION THAT LICENCES HAVE EXPIRED**

The Electronic Communications Services licences (No 0426/IECNS/Aug/09 and 0426/IECS/Aug/09) issued in terms of the Electronic Communications Act 36 of 2005 to **Netwave Internet** with address No 58 Unit 1, Kyalami Boulevard, Kyalami Park, Kyalami, Gauteng, Republic of South Africa are declared to have expired on the date of this *Government Gazette*: either since these licences have not become operative within the time period prescribed by Regulation or since the licensee has ceased its operations without having applied to ICASA for more time to do so.

.....

**ACTING CHAIRPERSON OF ICASA**

**DATE:** .....

---

*J. C. W. van Rooyen*

JCW van Rooyen SC  
Chairperson of the CCC

Date: 26 May 2017

The Members agreed with the above advice to Council as to its functions.

**ATTACHMENT: RELEVANT REGULATIONS**

**NOTE: THESE REGULATIONS HAVE BEEN AMENDED AS FROM 2016 – THE AMENDMENTS ARE, HOWEVER, NOT APPLICABLE TO THE JUDGMENT ABOVE. THE AMENDMENTS ARE, ACCORDINGLY, NOT INCLUDED HEREUNDER.**

**SEPTEMBER 2010 REGULATIONS (OPERATIONAL FROM 11 SEPTEMBER 2011)**

## **SCHEDULE 2**

### **INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICES LICENCES**

#### **1. Definition**

In these regulations terms used have the same meaning as in the Electronic Communications Act. (No. 36 of 2005) unless otherwise defined in these regulations:

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

“**ECN**” means an Electronic Communications Network;

“**ECNS**” means an Electronic Communications Network Service;

“**Effective date**” means the date on which the Licence is issued;

“**Licence**” means the individual ECNS Licence issued to the Licensee in the form contained in Annexure B of these regulations;

“**Licensee**” means the person named in Licence and issued with a licence to provide services in terms of [Chapter 3](#) of the Act;

“**Schedule**” means the schedule to the Licence containing the specific terms and conditions which the Authority has imposed upon the Licensee in terms of [section 9\(7\)](#) of the Act and the related legislation.

#### **2. Notification of licensee details and information**

(1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes in its licence:

- (a) the name of the Licensee;
- (b) contact details;
- (c) shareholding; and

(d) Notices and addresses.

(2) Any change or transfers of shares undertaken in terms of 2(1)(c) above must comply with all licence terms and conditions and the Act.

**3. Licence area**

The licence area is as defined in the Licence issued to a Licensee.

**4. Duration of the licence**

The Licence is valid for twenty (20) years from the effective date.

**5. Commencement and operation of service**

(1) A Licensee must commence operation of the ECNS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months.

(2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

**6. Services to be provided by the licensee**

A Licensee must construct, operate and maintain an ECN as well as provide ECNS in the licence area.

**7. Safety measures**

A Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take such safety measures as may be prescribed and in any event such reasonable and necessary safety measures to safeguard life or property, and to limit exposure to electromagnetic emission, radiation and related risks.

**8. Provision of information**

(1) The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide information, so as to enable it to:

- (a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;
- (b) allow for the assessment and allocation of applicable fees and related requirements;

- (c) facilitate the efficient use of scarce resources; and
  - (d) collect and compile information to be used for the purposes of sectoral analysis, planning, reporting and conducting inquiries
- (2) In respect of each information request referred to in sub-clause (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and identify a contact person to whom queries may be addressed.
  - (3) The licensee must provide the information in accordance with such format as may be prescribed by the Authority.

## **9. Publication of tariffs and fees**

A Licensee must submit to the Authority, on a bi-annual basis, a record of the actual services provided and the actual tariffs charged thereof during the previous six months.

## **10. Metering and billing arrangements**

- (1) A Licensee shall install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
  - (a) details of services rendered to the end-user;
  - (b) breakdown of charges associated with services, and
  - (c) such other relevant information associated with the end-user's account.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.
  - (a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:
    - (1) destination,
    - (2) dialled number,
    - (3) date,



- (4) time,
  - (5) duration, and
  - (6) charge for each individual transaction.
- (b) The detailed itemised bill must be provided:
- (i) via post or in an electronic format; and
  - (ii) at such a price that takes into account the difference in the mode of delivery

## 11. Specific terms and conditions

The Authority may impose additional terms and conditions upon the Licensee in terms of [section 9\(7\)](#) of the Act and the ICASA Act. These specific terms and conditions will be contained in the Schedule and may include but are not limited to:

- (a) Licence area;
- (b) ownership and control structures of the Licensee;
- (c) requirements for ownership and control by persons from historically disadvantaged groups in respect of the Licensee, in addition to any prescribed by the Authority;
- (d) human resources training and skills development undertaken by the licensee;
- (e) service requirements and quality standards; and
- (f) universal service and access obligations, including without limitation, detailed roll-out obligations and incentives for the provision of ECNS in rural and under-served areas, imposed by the Authority in addition to the payment of the prescribed contribution to the Universal Service and Access Fund.

## 12. Contravention and fines

Upon a determination of non-compliance by the Complaint and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

- (a) One Million Rands (R1 000 000) for contravention of [regulations 2, 3, 4, 5, 7, 8\(2\), 8\(3\), 9 and 10](#).
- (b) One Hundred Thousand Rands (R100 000) for contravention of any regulations not specified in [regulation 12\(1\)\(a\)](#); and
- (c) Additional One Hundred Thousand Rands (R100 000) for repeated contraventions of these regulations.

### 13. Notices and addresses

- (1) Any notice or certification given by the Authority or the Licensee shall be in writing and:
  - (a) if delivered by hand to the recipient's address, it shall be deemed, until the contrary is proven, that it has been received at the time of delivery;
  - (b) if posted by pre-paid registered post from an address within the Republic of South Africa, it shall be deemed, until the contrary is proven, to have been received on the 14th day after the date of posting; or
  - (c) if sent by facsimile transmission during normal business hours, proof of successful transmission shall be deemed to be proof of receipt, unless the contrary is proven.
- (2) A Licensee shall provide the Authority with an address where it will accept formal service of letters, documents and legal process in this regard as well as fax and telephone numbers on which it can be contacted as set out in the Licence.

### 14. Short title and commencement

These regulations are called the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010, and will come into operation by notice in the gazette.

### 15. Repeal of regulations

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Individual licences published in Notice 1138 of 30 November 2007 in its entirety.

## ANNEXURE B

### SCHEDULE 3

## INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES LICENCES

### 1. Definitions

In these regulations terms used have the same meaning as in the Electronic Communications Act, (No. 36 of 2005) unless otherwise defined in these regulations:

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

“**ECN**” means an Electronic Communications Network;

“ECNS” means an Electronic Communications Network Service;

“ECS” means an Electronic Communications Service;

“Effective date” means the date on which the Licence is issued;

“Licence” means the individual ECS Licence issued to the Licensee in the form contained in Annexure C of these regulations;

“Licensee” means the person named in Licence and issued with a licence to provide services in terms of [Chapter 3](#) of the Act.

“PECN” means a private electronic communications network; and

“Schedule” means the schedule to the Licence containing the specific terms and conditions which the Authority has imposed upon the Licensee in terms of [section 9\(7\)](#) of the Act and the related legislation.

## **2. Notification of licensee details and information**

- (1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes in its licence:
  - (a) the name of the Licensee;
  - (b) contact details;
  - (c) shareholder; and
  - (d) Notices and addresses
- (2) Any change or transfers of shares undertaken in terms of 2(1)(c) above must comply with all licence terms and conditions and the Act.

## **3. Licence area**

The licence area for operations under this Licence is the Republic or any part thereof.

## **4. Duration of the licence**

The Licence is valid for fifteen (15) years from the effective date.

## **5. Commencement and operation of service**

- (1) A Licensee must commence operation of the ECS specified in the Licence within six (6) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the six (6) months.

- (2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

**6. Services to be provided by the licensee**

A Licensee must provide ECS by means of an ECN operated by ECNS Licensee or a licence-exempt PECN operator.

**7. Safety measures**

A Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take such safety measures as may be prescribed and in any event such reasonable and necessary safety measures to safeguard life or property, and to limit exposure to electromagnetic emission, radiation and related risks.

**8. Provision of information**

- (1) The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide information, so as to enable it to:
- (a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;
  - (b) allow for the assessment and allocation of applicable fees and related requirements;
  - (c) facilitate the efficient use of scarce resources; and
  - (d) collect and compile information to be used for the purposes of sectoral analysis, planning, reporting and conducting inquiries.
- (2) In respect of each information request referred to in sub-clause (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and a contact person to whom queries may be addressed.

**9. Publication of tariffs and fees**

- (1) A Licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service:
- (a) have been made known to the end-user by:
    - (i) making such prices and terms and conditions available for inspection at its offices during business hours; and

- (ii) providing such details to anyone who requests same at no charge;
- (b) have been filed with the Authority at least seven(7) days prior to the provision of the said service. In making such a filing, a Licensee must utilise a format approved by the Authority in writing.
- (2) A Licensee must submit to the Authority, on a bi-annual basis, a record of the actual services provided and the actual tariffs charged therefore during the previous six months.

#### **10. Metering and billing arrangements**

- (1) A Licensee shall install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
  - (a) details of services rendered to the end-user;
  - (b) breakdown of charges associated with services, and
  - (c) such other relevant information associated with the end-user's account.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.
  - (a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:
    - (1) destination,
    - (2) dialled number,
    - (3) date,
    - (4) time,
    - (5) duration, and
    - (6) charge for each individual transaction.
  - (b) The detailed itemised bill must be provided:

- (i) via post or in an electronic format;
- (ii) at such a price that takes into account the difference in the mode of delivery.

## 11. Specific terms and conditions

The Authority may impose additional terms and conditions upon the Licensee in terms of [section 9\(7\)](#) of the Act and the ICASA Act. These specific terms and conditions will be contained in the Schedule.

## 12. Contravention and fines

- (1) Upon a determination of non-compliance by the Complaint and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:
  - (a) One Million Rands (R1 000 000) for contravention of [regulations 2, 4, 5, 7, 8\(2\), 9 and 10](#);
  - (b) One Hundred Thousand Rands (R100 000) for contravention any regulation not specified in [regulation 12\(1\)\(a\)](#), and
  - (c) One Hundred Thousand Rands (R100 000) for repeated contravention of the regulations.

## 13. Notices and addresses

- (1) Any notice or certification given by the Authority or the Licensee shall be in writing and:
  - (a) if delivered by hand to the recipient's address, it shall be deemed, until the contrary is proven, that it has been received at the time of delivery;
  - (b) if posted by pre-paid registered post from an address within the Republic of South Africa, it shall be deemed, until the contrary is proven, to have been received on the 14th day after the date of posting; or
  - (c) if sent by facsimile transmission during normal business hours, proof of successful transmission shall be deemed to be proof of receipt, unless the contrary is proven.
- (2) A Licensee shall provide the Authority with an address where it will accept formal service of letters, documents and legal process in this regard as well as a fax and telephone number on which it can be contacted as set out in the Licence.

## 14. Short title and commencement

These regulations are called the Standard Terms and Conditions for Individual Electronic Communication Services 2010, and will come into operation by notice in the gazette.

**15. Repeal of regulations**

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Individual licences published in Notice 1138 of 30 November 2007 in its entirety.

