

COMPLAINTS AND COMPLIANCE COMMITTEE¹

DATE: 15 September 2017

CASE NUMBER: 223 /2016

IN RE: OPENVOICE SERVICE PROVIDER (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Keabetswe Modimoeng
Mr Peter Hlapolosa
Mr Jacob Medupe
Mr Mzimkhulu Malunga
Mr Jack Tlokana

Matter prepared by Assessor Advocate. L Myeza

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 15 January 2009 Openvoice Service Provider (Pty) Ltd of physical address: Unit 2, Roos Street, Fourways Manor, Fourways, Republic of South Africa was issued with an Individual Electronic Communications Service Licence (ECS) and an Individual Electronic Communications Network Services Licence

¹ 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) by the Independent Communications Authority of South Africa (“ICASA”). These licences were placed before the CCC to consider whether to advise the Council of ICASA to make a declaratory order that the licensee no longer traded or had never traded in terms of the licences as issued to it by ICASA.

[2] On the papers before the CCC it appeared that the licensee had not filed financial statements with ICASA since it was issued with its first licence in 2006 – that licence having been converted to the present licences in January 2009 – up to and including 2011-2012. Later years were not referred to in the papers before the CCC.

[3] 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 same principle applies to the enforceability of USAF fees and licence fees. Thus: what would have been before the CCC formally, had the licensee been located, would have been the non-compliance for the year 2011-2012.

LICENSEE NON-SUBMISSION

[4] However, to get back to the issue before the CCC in this matter. Despite a notice in the December 2011 *Government Gazette* to file Annual Financial Statements for the year 2011-2012, there was no reaction from the licensee. In fact, there is no record of the licensee ever having communicated with Licence Compliance at ICASA after the issue of the 2009 licences. This matter was referred by ECS/ECNS Compliance Division to the CCC Coordinator in June 2013 so that it could be brought before the Complaints and Compliance Committee. It formed part of a substantial number of references by Compliance to the CCC Coordinator in June 2013. This created an administrative backlog of matters, each of which had to be processed in accordance with the rules of administrative justice and were, understandably, time consuming. The process of establishing whether the licensee had ever become active in terms of its

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.

licences, also led to no response from the licensee and then, ultimately, a search as to whether the licensee still exists and, if so, whether it is operational.

[5] The 2010 Regulations on Standard Terms and Conditions (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 from the time that the licence was issued to it. The different time periods are based on whether it is a network licence or not - the latter having the shorter period to become operational.⁴ A substantial fine may be advised to Council by the CCC if an application to not commence operations is not lodged with the Authority. This could, however, only be the result if the licensee is charged before the CCC for not so applying. This was not the case before the CCC and the CCC is not permitted constitutionally to add charges to the initial charge referred to it by Compliance.⁵

ATTEMPTS TO CONTACT THE LICENSEE

[6] Several attempts were made by the Coordinator's Office to obtain a response from the licensee as to the allegation of non-compliance. On 9 November 2016, the Coordinator sent a letter to the licensee, at its physical address, to bring the allegations of non-compliance to its notice. There was, however, no reply. The question then arose whether the licensee was or is active in terms of its licences. Attempts were made to reach the licensee on its email address, its landline and the mobile phone of the contact person indicated in the licences. The result, with the assistance of the ICASA inspectorate, was that the licensee was not found on the premises indicated on the licences. It is also not listed by the Wireless Access Providers Association. Details of these attempts are set out in the documentation which was placed before the CCC by the Coordinator of the CCC. The Licence Division at ICASA also indicated that the licences had also not been transferred,

⁴ STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL ELECTRONIC COMMUNICATIONS NETWORK SERVICES, 2010; STANDARD TERMS AND CONDITIONS FOR INDIVIDUAL ELECTRONIC COMMUNICATIONS SERVICES, 2010. Operational from 12 September 2011.

⁵ Compare *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA)

according to its records. A notice was then published on the Website of ICASA granting the licensee 21 working days to respond to the consideration by ICASA to cancel its licences. No response was received.

APPROACH

[7] 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 Mdodisa* 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)

[8] In light of the approach in the above matter, the CCC Coordinator has been at pains to undertake a thorough 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 has, once again, undertaken such an investigation in the present matter and that there is no reliable evidence that the licensee commenced business within the prescribed terms of six or twelve months or, at all. Furthermore, that reasonable steps have been taken to establish whether the licensee still exists or might have commenced operations.

The conclusion is, accordingly, that the licensee has not commenced business or applied for leave from ICASA to commence business at a later stage.

ADVICE TO COUNCIL AS TO ITS FUNCTIONS

[9] This is not a case where the CCC is advising Council as to an order 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 functions is, in terms of section 4(3)(e) of the ICASA Act, to revoke licences. In the normal course such a withdrawal will only take place after a full inquiry by the CCC in terms of section 17C of the ICASA Act and an advice to Council that the licence may be revoked - as a *sanction*. However, in the present case it is clear to the CCC that a hearing cannot be held, since there is no trace of the licensee. It would also be senseless to issue a sanction against a respondent, the whereabouts or existence of which could not be established.

Accordingly, the CCC is left with no other option but to advise Council that there is no evidence that the licensee still exists or had become operational or, if it had become operational, there is no evidence that it is presently operational.

[10] The authority of Council to *revoke* a licence in terms of section 4(3)(e) of the ICASA Act 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 also to ensure certainty within this economic sphere and protect the public against licensees which have ceased operating formally or simply stopped having contact with ICASA. Furthermore, that if such a licensee is in fact still operating, the matter could be referred to the relevant Director of Publications to prosecute the earlier licensee in terms of section 17H(3)(b) of the ICASA Act for doing business as if it were a licensee, without a licence.

Such an order by Council should be formal. The most appropriate manner to achieve that, would be to place the notice proposed hereunder in the *Government Gazette*.

A copy should also be placed on the ICASA Website.

INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

The Individual Electronic Communications Network Services Licence (No: 0124/IECNS/JAN/09) and the Individual Electronic Communications Service Licence (No:0124/IECS/Jan/09) issued by the Independent Communications Authority of South Africa, effective from 15 January 2009, in terms of the Electronic Communications Act 36 of 2005, to Openvoice Service Provider (Pty) Ltd with (as per the licenses) physical address Unit 2 Roos Street, Fourways Manor, Fourways, Republic of South Africa are declared to expire on the date of this Government Gazette either since the licences were not made operational within the period prescribed by Regulation or since operations in regard to the licences have ceased without the licensee having applied to ICASA for authorization to do so. The licensee could also not be traced. It would, forthwith, amount to a criminal offence if the said company or anyone else were to operate under any one of the said licences.

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Date:../../2017

CHAIRPERSON: ICASA

It is so advised by the CCC



JCW van Rooyen SC

Date: 17 September 2017

Chairperson of the CCC

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

