

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Meeting: 22 April 2016

CASE NUMBER 139/2015

IN RE: PACSET TELECOMS (PTY) LTD

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Ms Nomfundo Maseti
Mr Jacob Medupe
Mr Jack Tlokana
Ms Mapato Ramokgopa

No Representation for Pacset Telecoms (Pty) Ltd

From the ICASA's Licensing and Compliance Department: Ms Veronica Matsane and Mr M Nkosinkulu. In attendance from the Office of the Coordinator: Adv. Lwazi Myeza. Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] On 15 January 2009 Pacset Telecoms (Pty) Ltd ("Pacset") was issued with an Individual Electronic Communications Service Licence and an Individual Electronic Communications Network Service Licence by the Independent

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.

Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter to the Complaints and Compliance Committee (“CCC”), alleging that Pacset had not filed financial statements for the financial years 2011 and 2012. This should have been done in accordance with General Notices published in the Government Gazette in terms of the September 2011 Licence Fees Regulations.² Furthermore, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid in terms of the General Licence Fees Regulations 2012.

[2] 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 year-end February 2011 financial statement 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 Africa³ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁴ The allegation of omissions was sent to the licensee by the CCC Coordinator in 2015. Thus, only the omission to file the financial statement for the year ending February 2012 is before the CCC. That would also apply to USAF and licence fees.

PACSET’S DEFENCE

[3] The defence was that Pacset had in fact filed financial statements electronically for the years 2011, 2012 and 2013 – the 2012 year including the 2011 year. The defence was raised by a Mr Poovan Chetty in an email which was sent to the Coordinator’s Office within 15 days from the email sent in regard to this matter by the Coordinator’s Office. Copies of the financial statements for the 2012 and 2013 year-ends were attached to the email. The Coordinator’s

² Individual Electronic Communications Service Licence Regulations and the Individual Electronic Communications Network Service Licence Regulations 2011.

³ 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].

⁴ 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.

Office then requested verification that the statements were in fact filed as stated. No such verification was received.

[4] Given the lapse of three years from year-end 2012 it would be unfair to expect Mr. Chetty to still have supporting evidence of having emailed the statement for 2012 (as well as the 2013 statement, which is not part of the charge). Fact is that within 15 days from the receipt of the Coordinator's letter to Pacset, the copies were filed with the supporting evidence of approval by the auditors. On balance it would be unfair to simply reject the evidence of Mr Chetty. There could also not have been some ulterior motive in the light of the fact that Pacset, in fact, owes ICASA no licence fees or USAF fees. Hereunder these aspects will be considered. The circumstantial evidence favours Mr Chetty's version. Compare *National Employers' General Insurance Co Ltd v Jagers where Eksteen*⁵ Acting JP stated as follows at 440D- 441:

"In a civil case the *onus* is obviously not as heavy as it is in a criminal case but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true.

[5]Pacset's accountants, *GNI* (Durban), stated as follows in a letter to the Coordinator dated 19 November 2015:

"We confirm that since inception, Pacset earned zero sales. Income was generated via the Industrial Development Corporation grant under the Support Programme for Industrial Innovation. The grant was secured and expended for research and development in the mobile telecommunication sector. We further confirm that a moratorium was placed on the SPII fund in 2013. No grant funding was received in 2014 and 2015."

⁵ 1984(4) SA 437 (OK) at 440D-E; also compare *Cilliers v Botha en 'n Ander* [2003] All SA 288(T) at para [13] where the same approach was followed by the High Court.

The Coordinator's Office, after the matter was before the CCC, also received a copy of a letter from a Director of the Department of Trade and Industry dated 2 April 2015 confirming an application for financial support and that the matter was getting the attention of the Department. The letter supports the claim by Mr Chetty that Pacset was still involved in reaching the same objective in 2015 – although funds had no longer been made available from the Industrial Development Corporation.

USAF FEES

[6] In so far as the payment of USAF contributions is concerned, regulation 3 of the USAF Regulations (Feb 2011) provides as follows:

(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.

“Annual Turnover” is defined as follows in the said Regulations:

“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**; (emphasis added)

From the documentation before the CCC, as confirmed by the accountants, Pacset was financed for purposes of research, by the Industrial Corporation of South Africa, which was set up by Act 22 of 1940. There is no doubt that such financing would fall under a “government grant or subsidy.” From the above definition of “annual turnover” it is clear that government grants and subsidies are not included in turnover. Accordingly, there was no turnover in the 2012 year and no USAF contribution was payable. In fact, it is clear that there has never been any commercial turnover. The above mentioned copy of a letter from the DTI also confirms the *bona fides* of Pacset.

LICENCE FEES

[7] Licence fees are payable by licensees in terms of the ICASA General Licence Fees Regulations 2012, as amended. Such fees are payable on revenue, which is defined as follows in the said Regulations:

“**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.

As would appear from the previous paragraphs, there was no “gross flow of economic benefits during the period arising in the course of the ordinary activities” of Pacset. No licence fee was, accordingly, payable.

CONCLUSION

[8] When all the facts are considered, there is no reason why Pacset should not be believed. When called to the CCC hearing by the Coordinator it copied that Office with copies of the relevant financial statement plus the 2013 statement. That was done within 15 days from the date that the email from the Coordinator’s Office was sent. The stamp of approval from the auditors also carries particular weight. The records were clearly historical records dating from the relevant year (2012) plus 2013, which is not part of the original charge from Compliance. Furthermore, Pacset had no reason to provide false information. It, as appears from the above paragraphs [6] and [7], does not owe licence fees or USAF contributions.

CONCLUSION

[9] In the result, we have come to the conclusion that:

(1) Pacset Telecoms (Pty) Ltd has not failed to file the 2012 year- end financial statement and, in fact included the 2011 statement in the 2012 statement It also added the 2013 statement. The statements were duly audited.

(2) Pacset does not owe any USAF contribution or licence fee.

In the result the charge is dismissed.



28 May 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding on the merits.

