

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

Date of Meeting: 10 NOVEMBER 2016

CASE NUMBER 169/2016

IN RE: PAW PAW WIRELESS (PTY) LTD

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

From the Office of the Coordinator: Attorney Meera Lalla

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] The Independent Communications Authority of South Africa (“ICASA”) issued a Value Added Network Services Licence to Paw Paw Wireless (Pty) Ltd - hereinafter referred to as Paw Paw - in 2005. The business, including its licences, was transferred to the present shareholders in 2010. On 29 May 2009 the said

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<sup>1</sup> At ICASA. 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.

licence was converted by ICASA to an Electronic Communications Network Service Licence and an Electronic Communications Services Licence by the Independent 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 Paw Paw had not filed financial statements for the financial years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2010-2011 and 2011-2012 and that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”). Although this reference to the CCC was signed by a representative of the Compliance Division and the year 2013 appeared under the reference, the specific date was, unfortunately, not mentioned.

[2] The Coordinator’s Office referred the matter to Paw Paw on the 7<sup>th</sup> June 2015, requiring a response from the company. The response was that after the present shareholders had purchased the company (including the licences), Paw Paw had only become active in terms of the licences on 1 November 2012, which was confirmed by its auditors GVR Oosthuizen.

[3] The relevant Regulations under which the reference was made are from February and November 2011, which repealed the earlier regulations in this regard. In so far as the financial years before 2011-2012 are concerned, the CCC is not constitutionally empowered to hear the matters. The Constitution of the Republic of South Africa<sup>2</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>3</sup> Thus, only the contravention relating to the non-filing of financial statements and non-payment of USAF fees for the 2011-2012 financial year is before the CCC.

[4] On 21 June 2016 Paw Paw answered the letter from the Coordinator’s Office. The Managing Director indicated that Paw Paw had only commenced its business on 1 November 2012. This was confirmed by its accountants on 23 October 2014.

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<sup>2</sup> 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].

<sup>3</sup> 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.

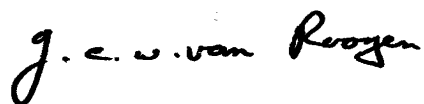
[5] The filing of financial statements is, according to the relevant Regulations, dependent on a notice for information from ICASA. These notices are published in the *Government Gazette*. The 2011 and 2012 Government Gazette notices in regard to the filing of financial statements state nothing about licensees which are not active, in so far as the filing of financial statements are concerned. The 2013 Government Gazette, however, states that “if a licensee has not commenced operation, (the) licensee is requested to submit a formal letter stating that they have not commenced operation.” The message is clear: the third category need only make a statement that it is not active under its licence.

[6] The charge from Compliance before the CCC does not include the year 2012-2013. As indicated above, Paw Paw only became active under its licences on 1 November 2012. If a charge (in this case, non-filing of financial statements for 2012-2013) is not included in the charge sheet, the CCC is not permitted to add such charge itself. 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). The charge also does not include the omission to inform ICASA of non-activity and, once again, the CCC may not add it.

## **FINDING**

**The charge against Paw Paw (Pty) Ltd is dismissed, since the relevant omissions were not included in the charge before the CCC.**

It should be noted that Paw Paw (Pty) Ltd has now, in any case, filed its financial statements for the period that it has been active and made payments due.



10 November 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

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