

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Meeting: 10 NOVEMBER 2016

CASE NUMBER 177/2016

IN RE: PLATOON TRADE AND INVEST 149 (PTY) LTD T/A WANATEL

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

In attendance From the Office of the Coordinator: Ms Meera Lalla

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 28 March 2009 Platoon Trade and Invest 149 (Pty) Ltd t/a Wanatel (“Wanatel”) was issued with an Individual Electronic Communications Network Service Licence and an Individual Electronic Communications Services Licence by

¹ 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.

the Independent Communications Authority of South Africa (“ICASA”). Presumably these licences replaced an earlier licence. ICASA’s Compliance Division (ECS and ECNS licences), which has a delegated monitoring function, referred this matter in 2013 (not stating the exact date – a matter that should be attended to in future references to the CCC) to the Complaints and Compliance Committee (“CCC”). It was alleged that Wanatel had not filed financial statements for the financial years 2005-2006, 2006-2007, 2007-2008, 2009-2010, 2010-2011 and 2011-2012, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid.

[2] Mr Devaux, a director of Wanatel, put forward in his answering affidavit that earlier years than 2011-2012 cannot be part of the reference before the CCC, since the earlier Regulations had been repealed in 2011. He referred to earlier judgments of the CCC in this regard. Mr Devaux is, indeed, justified in his submission. The relevant Regulations under which the reference was made, are from 2011.² In so far as the year-ends before 2011- 2012 are concerned, the CCC is not constitutionally empowered to hear the matters. 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 Thus, only the contravention relating to the non-submission of the 2011-2012 financial statement is before the CCC. Later years are not before the CCC, since this reference was made in 2013. The same principle applies to the payment of USAF fees and licence fees.

[3] As would appear from the documentation the financial statement for 2011-2012 was filed. The director stated that he was advised that such a statement should be filed, although the company had not been active in terms of its licences. According to the 2011 Regulations, ICASA is empowered to call upon licensees to, for example, file financial statements. This was done in three Government Gazettes. The 2011 and 2012 Government Gazette notices in

² USAF = February 2011 and the other two, September 2012 – see the Addenda to this judgment.

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.

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 2013 Gazette has a bearing on the financial year 2012-2013, which is not before the CCC in this matter. The message is clear: the third category need only make a statement that it is not active under its licence and file it with ICASA, no financial statement need be filed. Wanatel did, according to the affidavit of its director, inquire in an email, which he attached as Annexure B, what Wanatel’s duties were if it were not active in terms of its licences. No answer, according to the affidavit, was received. We, however, note that a letter from Compliance dated 18 April 2013 was sent to licensees. In it, there was a reference to informing ICASA in a formal letter if it was not active. This letter, however, obviously refers to the financial year 2012-2013 or 2013-2014, which is not, as indicated above, before the CCC in this matter

[4] In a letter dated 13 September 2016 to the Coordinator’s Office, it was pointed out by Wanatel that it was no longer operating only as a reseller, but that Wanatel is presently providing services under its licences. It had also filed all outstanding financial statements. In a letter dated 24 October 2016 Mr Nkosinkulu from Compliance indicated that Wanatel has submitted the required information and that a desist order would suffice.

[5] In conclusion, it is clear that Wanatel has only commenced acting in terms of its licences after the financial year of 2011-2012. And, as indicated, the latter is the only financial year before the CCC. No notice that ICASA had to be informed as to non-activity was sent to licensees before the financial year 2012-2013 or 2013-2014 (as pointed out above).

FINDING

(1) As indicated above, there was no duty on Platoon Trade and Investment (Pty) Ltd t/a Wanatel to file a financial statement for the financial year 2011-2012, while it was not active in terms of its licences. No finding is made against it in this respect.

(2) Platoon Trade and Investment (Pty) Ltd inquired from ICASA what its duties were if it were not active under its licences. There was a notice to licensees dated 18 April 2013. However, only the 2011-2012 year is before the CCC and there had been no notice in this respect during that year. The duty to inform ICASA of non-activity was also not mentioned in the Government Gazette which pertained to the 2011-2012 financial year. This was only mentioned in the Government Gazette which pertained to the 2012-2013 year - which is not before the CCC.

In the result no finding is made against Platoon Trade and Investment (Pty) Ltd t/a Wanatel.



10 November 2016

PROF JCW VAN ROOYEN SC

CHAIRPERSON

The Members of the CCC agreed with the finding.

