COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Meeting: 8 April 2016 **CASE NUMBER 133/2015**

IN RE: GREENVILLE TRADING 292 CC T/AS SAFRICOM NORTHWEST (PTY) LTD

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

Ms Sumaiyah Makda from Ellipsis acting for SAFRICOM.
In attendance from the Office of the Coordinator: Adv. Lwazi Myeza

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JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 15 January 2009 Greenville Trading 292 CC trading as SAFRICOM Pty Ltd ("SAFRICOM") was issued with an Individual Electronic Communications

[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.

Service Licence and an Individual Electronic Communications Network Service Licence by the Independent Communications Authority of South Africa. These licences substituted a so-called VANS licence which had been issued in 2007. 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 SAFRICOM had not filed financial statements for the financial year-ends 2008 to 2013, that no contribution had been made in terms of the Universal Service and Access Fund ("USAF") and no licence fees paid.

[2]The relevant Regulations, under which the reference was made, are both from 2011.[2] There were also allegations that no financial statements were filed for the years 2008-2013. The Constitution of the Republic of South Africa[3] 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 2013. Thus, only the contravention relating to the non-submission of the 2012 and 2013 year-ends is before the CCC. Earlier omissions are, accordingly, not before the CCC since they relate to dates before the 2011 Regulations became operative, including year-end 2011, which would be February 2011.

[3] An affidavit by a director of the Respondent was filed in which he indicated that the said financial statements were, in fact, filed in time. He conceded that he could not, at this stage, immediately find the 2013 financial statements as a result of staff turnover and that the company might have been a bit late with the 2013 filing.

[4] The conclusion which we have reached, judged by the facts as a whole, is that the benefit of the doubt should go to the Respondent. A factor which could have been contributed to this confusion was the change of particulars of the Respondent. In fact, the director in his affidavit indicates that the change

[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.

of details, which had been submitted to the Authority, had not been recorded by the Authority.

[5] The CCC's conclusion is that it has not been shown to its satisfaction that the financial statements for the years 2012 and 2013 were indeed late. Judged by the documentation included in the file before the CCC, all payments were indeed made. In the case of 2012, the payment was one month late. That, in our view, amounts to substantial compliance.[5]

[6] A finding on the merits cannot, accordingly, be made against SAFRICOM.

26 May 2016

PROF JCW VAN ROOYEN SC CHAIRPERSON

The Members of the CCC agreed with the finding on the merits and the advice to Council on the sanction.

[5] That "substantial compliance" in effect amounts to "compliance" is borne out by several decisions of our Courts. Compare *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para. [21] in which Acting Chief Justice Moseneke stated as follows: "While our law recognises that substantial compliance with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal. Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and Mrs Ferris had substantially complied by the time summons was issued — at that stage they had only paid R1000 of the almost R9000 owing under the order."