

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

Date of Meeting: 3 August 2017

CASE NUMBER 241/2017

**IN RE: SOFT TOUCH COMPUTING CC T/A SOFTNET INTERNET SERVICES**

**PANEL:** Prof JCW van Rooyen SC  
Councillor Keabetswe Modimoeng  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Mr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana

In attendance from the Office of the Coordinator: Ms Meera Lalla (Attorney)

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On the 28<sup>th</sup> April 2009 Soft Touch Computing cc t/a Softnet Internet Services (“Softnet”) was issued with an Individual Electronic Communications Network

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<sup>1</sup> 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 in terms of section 33 of the Constitution 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 Service Licence by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Compliance Division (ECS and ECNS licences) referred this matter in 2013 to the Complaints and Compliance Committee (“CCC”) at ICASA. It alleged that Softnet had not filed financial statements for the financial years 2005-2006, 2006-2007, 2007-2008 and 2008-2009, 2009-2010, 2011-2012 and 2012-2013, that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”) and no licence fees paid.

### **PROCEDURAL LIMIT TO REFERENCES**

[2] The relevant Regulations, under which the reference to the CCC was made, were operational from September 2011.<sup>2</sup> 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 Africa<sup>3</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>4</sup> Later years are not before the CCC, since this reference was made in 2013. The same principle applies to the enforceability of USAF fees and licence fees. Of course, the fact that this procedure as to the said earlier years cannot be instituted before the CCC, does not affect the existence of debts – which is a civil law matter.

[3] According to the said Regulations, ICASA is empowered to call upon licensees to, for example, file financial statements. This was done in *Government Gazettes* relevant to the said two financial years.

### **RESPONSE FROM THE RESPONDENT**

[4] The majority member of the close corporation, Mr Mark Rolan Schormann, filed the following affidavit in response to the charge.

1. I am the majority Member of the Respondent and have been authorised by the members of the Respondent to depose to this Answering Affidavit on their behalf.

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<sup>2</sup> USAF = February 2011 and the other two, September 2012.

<sup>3</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>4</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.

2. The facts deposed to herein are true and correct and, save where the context may indicate otherwise, fall within my personal knowledge.

3. We note the contents of the letter from the CCC Assessor, dated 5 April 2017. In terms of this letter it is alleged that we had failed to submit financial statements despite numerous requests and demands for same and had also failed to make payment (of fees)....

5. Whilst we note that the ICASA Complaint is not dated, the letter from the CCC assessor appears to indicate that this matter was referred to it on or about 20 June 2013. We note that we have not previously received the ICASA complaint nor had sight of same until we received the letter from the CCC Assessor. We are not included on the list attached to the Complaint either.

#### **EXTENSION OF DEADLINE FOR RESPONSE**

6. Paragraphs 3-5 of the CCC letter indicate that the ICASA Compliance Division has alleged that we did not submit financial statements nor make payment of the Annual Licensing fees and USAF contributions that would have fallen due. Paragraph 22... indicates that we have failed to submit the financial statements for the periods 2005-2006, 2006-2007, 2007-2008 and 2008-2009, 2009-2010, 2011-2012 and 2012-2013 and paragraph 23 indicates that due to this the Authority was unable to determine the contributions payable in terms of the USAF regulations 2011.

#### **2005/2006 to 2010/2011 FINANCIAL YEARS**

7. We note the following extract from the *Namanet* judgment of the CCC (case 124/2015):

“The USAF annual financial contribution by licensees, which finds its origin in the Telecommunications Act 103 of 1996, was incorporated by section 89 of the Electronic Communications Act 2005 (“ECA”), which became effective in July 2006. Regulations governing the matter were published in the Government Gazette No. 31499, dated 10 October 2008. These regulations included sanctions which could be imposed by the ICASA Council on the recommendation of the CCC. The 2008 Regulations were, however, repealed in 2011 and substituted by a new set of regulations on the 10<sup>th</sup> February 2011. That means that only omissions to pay the USAF levy as from 10 February 2011 are before the CCC. This is so since a contravention of a regulation which has been repealed cannot, after its repeal, be a basis for an investigation by the CCC. The Constitution of the Republic of South Africa does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation. The allegation of omissions to make USAF contributions was sent by the CCC Coordinator to the licensee in 2015. Thus, only contraventions as from 10 February 2011 are, constitutionally, before the CCC.

The same issue arises in regard to the filing of financial statements. Regulations, in accordance with which the filing of annual financial statements could be required from licensees were provided for in the Standard Terms and Conditions published in Notice 1138 of 30 November 2007 in the Government Gazette No. 30530. These Regulations were repealed on 12 September 2011 when new Regulations became operational. These Regulations contain a provision which grants ICASA the right to require information from licensees. Once again, only contraventions of Regulations from 12 September 2011 may, constitutionally, be adjudicated by the CCC.” (Footnotes omitted)

8. [In the light of the above, charges before 2011-2012 should not have been included in the 2013 reference to the CCC]

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10. The cc has been dormant from approximately July 2013. It last submitted its annual returns to the Companies and Intellectual Properties Commission (CIPC) on 16 May 2013 and had not engaged in any commercial activities thereafter. This can be confirmed from the CIPC records, which can be provided on request.

11. For this and other reasons – including fraudulent activities of the Accounting Officer who had been appointed to attend to the finances and regulatory activities of the cc – we do not have the financial records relating to the financial years for which the cc had been trading. This includes financial statements (other than 2009/2010 as set out hereunder) which had not been finalised due to the falling revenue, bank statements or records of payments made.

12. The cc has entered into an agreement with a ... company in Nelspruit<sup>5</sup>...which has a need or the IECNS and IECS licences and intends to apply to ICASA to transfer these licences to this company once they have gathered the information and documentation required for the transfer application to ICASA....

#### **Fees records 2009-2014**

13. As we have not been able to locate the above payments and because of the upcoming transfer application, we deem it prudent to attend to submission of documentation as we have on hand, confirmation of details where we do not have records in this affidavit and re-payment of fees that ICASA deems to be outstanding.

14. The financial statements for 2009-10 are attached... As we have not retained records for the years 2010-2014, we are basing the licensed revenue for these years on a reasonable extrapolation base on the 2009-10 figures. We note that this is a very conservative extrapolation of the licensed revenue; the actual licensed revenue would have been below the figures we have extrapolated.

15. Our calculation of Annual Licensing fees and the USAF Contribution for the financial years 2009 to 2014 is attached as Annexure B. We will liaise with the ICASA Compliance Division and Finance Division to ensure that our calculations are correct and will then make payments as calculated therein (or amended based on our consultation) and undertake to forward proof of payment of these fees to the CCC once finalised.

16. We apologize for the lack of suitable records on our side. We would also like to thank the CCC for bringing this to our attention, so we could attend to addressing the outstanding obligations before submitting the application for transfer of the licences.

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<sup>5</sup> Note by Chairperson of the CCC: The name and structure of members of the cc is omitted to protect its privacy and that of its members.

17. We trust that we will soon have addressed any outstanding reporting and payment obligations to the satisfaction of ICASA and the CCC.”

## **THE MERITS**

[4] The Compliance Officer, Ms Mhlongo, confirmed with the Coordinator of the CCC, in a letter dated 26 May 2017, that the licensee has failed to submit audited financial statements for the years 2011-2012 and 2012-2013. She obviously brought this confirmation in line with the judgments of the CCC that years before 2011-2012 were not within the CCC’s jurisdiction. And further, that the reference from Compliance in 2013 ended with the 2012-2013 year; the CCC not, according to the Constitution, being permitted to add further years to the reference from Compliance.<sup>6</sup>

[5] Mr Schormann is, of course, correct in arguing that the CCC only has jurisdiction as from the year 2011-2012. He has, however, nevertheless filed the Annual Financial Statement for the year 2009-2010. For present purposes that is, however, not of any assistance to Softnet. It is clear that Softnet has been active in the years 2011-2012 and 2012-2013.

[6] The intention of Softnet to transfer its licences - even if it seems quite probable from a business perspective – is not permissible if it has not filed Annual Financial Statements for the years 2011-2012 and 2012-2013. In fact, that is as far as the jurisdiction of the CCC extends. The Respondent will, however, also have to file a financial statement for the year 2010-2011. The statement for 2009-2010 was also not properly confirmed under oath by an accountant. Mr Shormann states in his affidavit that Softnet indeed filed its “annual returns” with the Companies and Intellectual Properties Commission on 16 May 2013. Softnet would, thus, not seem to be without financial records. As to the fact that Softnet has not been active thereafter, a confirming affidavit to Compliance would be necessary before Softnet may be transferred.

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<sup>6</sup> Compare *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA)

## **FINDING**

[7] The finding is, accordingly, insofar as the matter before the CCC is concerned, as follows:

(a) Softnet has omitted to file its Annual Financial Statements for the years 2011-2012 and 2012-2013.

(b) Softnet has failed to pay ICASA USAF fees as properly confirmed in its Annual Financial Statements for the years 2011-2012 and 2012-2013.

(c) Softnet has, if applicable and as based on its turnover, failed to pay licence fees.


## **ADVICE TO COUNCIL AS TO AN ORDER**

[8] That Soft Touch Computing cc T/A Softnet Internet Services be ordered as follows:

(a) That it files its financial statements for the years 2011-2012 and 2012-2013 duly audited or signed and confirmed under oath by an Accountant on or before 11 December 2017 with the Licence Compliance Division at ICASA.

(b) That insofar as ICASA determines what the USAF fees must be and, if applicable, licence fees, such amount be paid within the period determined by ICASA's Finance Division.

(c) That it files an application, in the form provided by the Licence Compliance Division of ICASA, as to non-activity within 30 work days after this judgment is issued. According to the Affidavit of Mr. Shormann, that would be from the financial year 2014-2015.



PROF JCW VAN ROOYEN SC

10 September 2017

CHAIRPERSON

The Members of the CCC agreed with the finding and the submission to Council of ICASA on the order that it may consider.

