

COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 18 September 2015

CASE NO: 114/2015

IN THE MATTER OF: TWIN PEAK TECHNOLOGIES CC, AS REFERRED TO THE CCC BY THE COMPLIANCE DIVISION AT ICASA

EXECUTIVE SUMMARY BY CHAIRPERSON

[1] Twin Peaks Technologies (“TPT”) had not filed any financial statements with ICASA and there has also not been a payment towards the Universal Service Access Fund from the time when its licences were issued in January 2009.

[2] When TPT was called upon to appear before the CCC as a result of these omissions, financial statements for the years 2011-2015 were filed. TPT explained that they had believed that financial statements only had to be filed once they had commenced operating in terms of the licence. In the circumstances the CCC regarded the late filing as substantial compliance.

[3] As to USAF contributions, the Regulations provide as follows:

3. Contributions to the universal service and access fund

(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. (emphasis added)

Since it was undisputed that TPT had not commenced business, the legal question was whether TPT has had “turnover” in terms of the regulation quoted above. The USAF Regulations define “Annual Turnover” as follows:

“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.

The CCC’s conclusion was that since the planned business of TPT had not commenced yet, no USAF contribution was due. There was, accordingly, no contravention of the Regulations requiring payment of USAF fees.

[4] A decisive consideration for the CCC's approach in this matter is the dedication with which TPT is approaching its plans, which amounts to an enormous venture. Substantial success has been achieved. The judgment deals with this progress.


[5] Since the omission to inform ICASA that TPT had not yet commenced with its operations was not added to the alleged contraventions before the CCC, the CCC did not deal with this. It is a fundamental principle of our law that an accused – in this case a licensee (respondent) who is alleged to be in contravention of a regulation – must be informed of the case which it must meet with sufficient clarity. This was not done¹ and therefore no finding may be made in that regard. The Regulations are, however, clear in this regard. Regulation 5 provides as follows:

A Licensee must commence operation of the ECNS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months.

In the case of an ECS the term is 6 months.

To ensure that the omission to inform ICASA, as required above, does not lead to a further matter before the CCC, the management of TPT is advised to urgently apply to ICASA in terms of the above regulation for a further extension and show good cause why more time is necessary. The CCC believes that such cause exists, but TPT must comply with the regulation and file an application with ICASA as soon as possible. The contact person would be Mr M Nkosinkulu from ICASA's Compliance Department.

[6] Since no contravention was found by the CCC, no recommendation as to sanction is made to the Council of ICASA.



Chairperson

¹ Which is quite understandable in this case, since it was not known before the hearing what the position was.

COMPLAINTS AND COMPLIANCE COMMITTEE²

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CASE NO: 114/2015

IN THE MATTER OF: TWIN PEAK TECHNOLOGIES CC, AS REFERRED TO THE CCC BY THE COMPLIANCE DIVISION AT ICASA

PANEL: PROF JCW VAN ROOYEN SC, CLR NOMVUYISO BATYI, MS NOMFUNDO MASETI and PROF KASTURI MOODALIYAR.

From Compliance (ECS and ECNS): Mr M Nkosinkulu.

IN ATTENDANCE: Adv Lwazi Myeza from the Office of the Coordinator of the CCC.

Coordinator: Ms Lindisa Mabulu.

JUDGMENT

PROF JCW VAN ROOYEN SC

BACKGROUND

[1] Twin Peak Technologies cc (“TPT”) was granted two licences on the 15th of January 2009 by the Independent Communications Authority of South Africa (“ICASA”) in terms of the Electronic Communications Act 2005 (“ECA”). One was an Individual Electronic Communications Network licence and the other was an Individual Electronic Communications Service Licence.

1.The Complaints and Compliance Committee (“CCC”) is an independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act (“ECA”) 2005. Such judgments are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Consumer and Compliance Department or Inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 (“ECA”) 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.. 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 as to sanction, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

[2] TPT has not filed any financial statements with ICASA and there has also not been a payment towards the Universal Service Access Fund from the time when its licences were issued.

[3] When TPT was called upon to appear before the CCC as a result of these omissions, financial statements for the years 2011-2015 were filed.

APPLICABLE LEGISLATION

[4] 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 ECA, which became effective in July 2006. Regulations governing the matter were then 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 10th February 2011.³ 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 Africa⁴ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁵ The allegation of omissions to contribute was sent to the licensee in May 2015. Thus, only contraventions as from 10 February 2011 are before the CCC.

[5] The same issue arises in regard to the filing of financial statements. Regulations which made the filing of annual financial statements obligatory 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. Thus, only contraventions of Regulations from 12

³ See the Addendum for the USAF Regulations.

⁴ 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].

⁵ And it is constitutionally acceptable – see *Sibiya and Others v Director of Public Prosecutions, Johannesburg, and Others* 2005 (5) SA 315 (CC).

September 2011 may be adjudicated by the CCC, since a charge was not made before that date for earlier contraventions of the regulation to file financial statements.

EVIDENCE BY REPRESENTATIVES OF TPT

[6] Before a finding can be made against TPT, background as to the activities of TPT is particularly relevant. TPT is situated in QwaQwa, which falls within the Free State Province of the Republic of South Africa. At the hearing of this matter the CCC was informed by Mr Mofokeng, the managing member of TPT, that TPT has not commenced providing electronic communications services yet. He explained that the aim of TPT is to provide services to schools in the whole Free State – which, from a management and financial perspective, amounts to a wide-ranging task. TPT has, accordingly, constantly been active in working towards its ultimate goal: to provide schools and other clients in the Free State with electronic services. In the process it had to obtain the authorisation of the Premier of the Free State, which authorisation was ultimately issued. Schools also had to be contacted. Since government is no longer prepared to provide licensees with money before a project has been finalised, financial support had also to be found. On the whole, we were informed, TPT is, however, clearly on its way to delivery.

[7] We were also referred to an agreement with a significant potential client which undertook to grant a contract to TPT if it were to be able to find the necessary financial support. The supporting letter, which demonstrates confidence in TPT, dated 10 January 2014, was made available to the CCC. In the letter the acting CEO of Lejwe Le Putswa Development Agency (“LDA”), Welkom appoints TPT: (1) To prepare Bankable Feasibility Studies/ Business Plans for the identified projects; and (2) To source funding for these projects – which will be at the risk of TPT. Upon successfully raising the required funding towards the identified projects, LDA undertook to enter into a service level agreement with TPT. The agreement will commit TPT to assist LDA in the achievement, amongst others, in identifying the appropriate investors (financial and technical) in the projects. It was pointed out in the letter that Lejweleputswa has been proclaimed as a growth point by the Free State Provincial Government. The granting of this project to TPT, as well as the

authorisation by the Premier, demonstrates TPT's good name and *bona fides* in working towards its objectives. Added to this, the CCC was informed that the Department of Trade and Industry is planning to assist TPT in its broadband endeavour and that TPT has signed a contract with the Department.

[8] TPT, however, conceded that it should have communicated with ICASA. The management was, however, under the impression that financial statements were only due to be delivered to ICASA, once it commenced providing coverage. ICASA also had the wrong email address of TPT.

ADDRESSING THE ISSUE

[9] The USAF Regulations provide as follows:

3. Contributions to the universal service and access fund

(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.

[10] Since it was common cause that TPT has not commenced business, the legal question is whether TPT has had "turnover" in terms of the regulation quoted above. The USAF Regulations define "Annual Turnover" as follows:

"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.

It is also of interest to refer to the *Shorter Oxford English Dictionary* in this regard. It defines "turnover", insofar as it is relevant for this inquiry, as "the total amount of business done in a given time; also the total amount of goods produced and disposed of by a manufacturer;... also, the net profit of a business in a given time".

The Sixth Schedule of the Income Tax Act 1962, which deals with micro businesses, also provides some guidance in determining what "turnover" means within a tax environment. It provides as follows:

“The taxable turnover of a registered micro business in relation to any year of assessment consists of all amounts not of a capital nature received by that registered micro business during that year of assessment *from carrying on business activities* in the Republic, ...” (emphasis added)

Our conclusion is that since the planned business of TPT has not commenced yet, no USAF contribution was payable. There was, accordingly, no contravention of the Regulations requiring payment of USAF fees.

[11] The second matter has to do with the omission to provide financial statements to ICASA. Although the relevant regulations do not specifically refer to the provision of financial statements, the regulations do provide that where ICASA calls upon a licensee to provide information, it must do so. On 16 September 2011 ICASA issued a General Notice calling upon all licensees to furnish Annual Financial Statements to ICASA and to further provide proof of payment of USAF and general licence fees for the period 2010-11 to enable ICASA to carry out its duties. This notice further informed licensees of the interest and late penalty which would be levied on any payments after the prescribed period. It also instructed licensees to provide their latest contact details to ICASA. The notice was also published on the website of ICASA.

[12] The defence of TPT is that it did not know that it had to file financial statements *before* it had commenced delivering services. As stated above, when the present matter was communicated to TPT, it reacted and provided the financial statements at the hearing of the matter. Although this kind of defence is not acceptable where business has indeed commenced, the omission to file by TPT is understandable.⁶ And, of course, the main reason for ICASA’s notice referred to above, was to determine whether USAF contributions were payable. As held above, TPT has not commenced business and its ignorance was, in the circumstances, understandable. TPT has, in any case, now delivered all the relevant financial statements. In the circumstances we will regard this as substantial performance.⁷ They are, in any case,

⁶ That ignorance of the law is a defence has been held by our Appellate Division – see *S v De Blom* 1977 (3) SA 513 (A).

⁷ 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

irrelevant for the payment of USAF contributions, since the business has not yet commenced and, as held above, no USAF payments are payable.

[13] A decisive consideration for our approach in this matter is the dedication with which TPT is approaching its task. Given its plans, it amounts to an enormous venture. Substantial success has been achieved and at the hearing we unanimously urged the manager and the secretary not to bring matters to a standstill as a result of this hearing. Mr Nkosinkulu, from Compliance, agreed and offered his assistance.

[14] A last word should, however, be added. Since the omission to inform ICASA that TPT had not yet commenced with its operations was not added to the alleged omissions before the CCC, we did not deal with this. It is a fundamental principle of our law that an accused – in this case a licensee (respondent) who is alleged to be in contravention of a regulation – must be informed of the case which it must meet with sufficient clarity.⁸ This was not done⁹ and therefore no finding may be made in that regard. The Regulations are, however, clear in this regard. Regulation 5 provides as follows:

A Licensee must commence operation of the ECNS specified in the Licence within twelve (12) months from the effective date, unless the Authority grants, on

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.”

⁸ See section 35(3)(a) of the Constitution of the Republic of South Africa 1996. That the CCC may only act within the powers granted to it and must exercise those functions in conformity with constitutional principles, is based on binding authority: NAVSA JA states in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013 (5) SA 24 (SCA) at para [1] “Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. *This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.” (emphasis added, footnote omitted); also see Navsa JA’s judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

⁹ Which is quite understandable, since it was not known before the hearing what the position was.

good cause shown, an extended commencement period on written application, prior to the expiry of the twelve (12) months.

This judgment may be attached to that application which should, for all practical purposes, be sent to Mr Nkosinkulu from Compliance at ICASA.

[15] In the result, the CCC's finding is that in the special circumstances of this case and, particularly the *bona fide* dedication of management to achieve results, no finding on the merits is made against Twin Peak Technologies (Pty) Ltd. The only contravention was that it had not filed financial statements. They have done so at the hearing and we regard that as substantial compliance. TPT was under the bona fide impression that financial statements must only be filed once it commenced using spectrum. In any case, the main objective of the filing of financial statements is that USAF contributions may be monitored by ICASA. As pointed out above, no such fees were payable.

The finding is, accordingly, that TPT has not contravened any regulation as set out in the charge before us.

This being the case, no recommendation is made to Council as to the imposition of a sanction.



28 September 2015

Prof JCW van Rooyen SC

Councillor N Batyi, Ms N Maseti and Prof K Moodaliyar agreed with the judgment of the Chairperson.

ADDENDUM

USAF REGULATIONS 2011

Applicable from 10 February 2011 (Regulations published in Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 repealed)

1. Definitions

In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned.

“Act” means the Electronic Communications Act, 2005 (Act No. 36 of 2005, as amended)

“Agency fees” means the percentage of fixed fees due to the agent;

“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;

“Applicable Interest Rate” means the uniform interest rate set by the Minister of Finance in terms of section 80(1)(b) of the Public Finance Management Act 1 of 1999;

“BS Licensee” means broadcasting service licensee;

“ECNS Licensee” means Electronic Communications Network Service Licensee;

“ECS Licensee” means Electronic Communications Service Licensee;

“Fund” means the Universal Service and Access Fund established in terms of [section 87\(1\)](#) of the Act;

“Licensed Services” means ECS, ECNS and BS provided pursuant to a licence issued to a Licensee in terms of Chapters 3, 4 and 9 of the Act.

“the MDDA” means the Agency established in terms of the Media Development and Diversity Agency Act No. 14 of 2002;

“Service provider discounts” means financial incentives offered to service providers by licensees for the purpose of subscriber base improvement;

“USAF Contribution” means the payment due to the Fund in terms of these regulations.

2. Object of the regulations

- (1) These regulations seek to:
 - (a) prescribe the annual contributions to be paid to the Universal Service and Access Fund (“the Fund”) by persons issued with licences in terms of chapters 3 and 9 of the Act;

- (b) specify the date when such contributions to the Fund become payable and the manner in which they must be paid.

3. Contributions to the universal service and access fund

- (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.
- (2) A BS licensee who has paid an annual contribution to the MDDA must set off that contribution against its USAF Contribution, provided that the MDDA contribution and the USAF contribution against which it is set off are for the same financial year.

4. Payment of contributions

- (1) Where a legal entity holds any combination of a BS Licence, ECS Licence and/or ECNS Licence, such entity may calculate the USAF contribution based on the Annual Turnover from aggregated revenue generated from the combined licences.
- (2) Payments in respect of contributions to the Fund:
 - (a) are due annually based on the licensee's financial year;
 - (b) are payable within 6 months from the end of the licensee's financial year; and
 - (c) May only be paid by way of an electronic transfer or via a direct deposit into the Authority's bank account, and
 - (d) must be based on the:
 - (i) Audited annual financial statement of the licensee; or
 - (ii) Financial statements signed and sworn to by the accounting officer of the licensee where the licensee is not legally obliged to provide audited financial statements.

5. Interest

Interest on all late payments in respect of contributions to the Fund is payable at the Applicable Interest Rate and in accordance with the manner prescribed in regulation 4 where payment is overdue.

6. Amendment or repeal

Government Notice 1270 of Government Gazette No. 31499 dated 10 October 2008 is hereby repealed.

7. Contraventions and penalties

- (1) Upon a determination of non-compliance by the Complaints and Compliance Committee in terms of the ICASA Act, the Authority may impose a fine not exceeding:

- (a) One Hundred Thousand Rands (R100, 000. 00) for contravention of regulations 3, 4(2) and 5.
- (b) Fifty Thousand Rands (R50, 000. 00) for contravention of all the regulations not specified in regulation 7(1)(a), and
- (c) Additional One Hundred Thousand Rands (R100, 000. 00) for repeated contravention of the regulations.

8. Short title and commencement

- (1) These regulations will be effective from the date of publication in the Government Gazette.
- (2) These regulations will be called the USAF Regulations, 2011.