

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

Date of Hearing: 9 September

CASE NUMBER 121/2015

**IN RE: UKAHLAMBA COMMUNICATIONS (PTY) LTD referred to the CCC by ICASA's Compliance Division (ECS and ECNS licences)**

**PANEL:** Prof. JCW Van Rooyen SC  
Cllr Nomvuyiso Batyi  
Ms Nomfundo Maseti  
Prof. Kasturi Moodaliyar  
MrJacob Medupe

No appearance by or on behalf of the licensee.  
From the Office of the Compliance Division: Mr M Nkosinkulu

In attendance from the Office of the Coordinator: Adv T Mtolo

Coordinator of the CCC: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On the 31st August 2008 Ukhahlamba Communications (Pty) Ltd ("Ukhahlamba") was issued with a Class Electronic Communications Network

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<sup>1</sup> An Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. 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 CCC, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

Licence (“ECNS”) and an Individual Electronic Communications Service Licence (IECS) by the Independent Communications Authority of South Africa (“ICASA”). ICASA’s Licence and Compliance Division referred this matter in June 2013 to the Complaints and Compliance Committee (“CCC”), alleging that Ukhahlamba had, since it was issued with the said licences, failed to submit Financial Statements and to contribute to the Universal Service and Access Fund (“USAF”).

[2] 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 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 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. The CCC is only mandated to act in terms of regulations which existed at the time of the alleged omission. In other words, it is too late to refer contraventions before 10 February 2011 to the CCC after 10 February.

[3] 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 September 2011 may be adjudicated by the CCC, where the matter was referred the CCC after 12 September 2011.

[4] After correspondence from the CCC Coordinator’s office on 18 June 2015 to Ukhahlamba, in which the latter was called upon to appear before the CCC, the following letter, dated 20 July 2015, was received from Ukhahlamba’s Mr GJM Mnyengo:

“This is to confirm that this company has never been operational since the receipt of the licence. Whenever we attended meetings at ICASA, we were always promised that ICASA

will organize funding for us. The ICASA Chairperson then was Ms Mamodupi Mohlala.<sup>2</sup> We waited until most of the members got demotivated. Is there any plan that ICASA can assist us to be operational?”

[5] Whilst the CCC has sympathy with Ukhahlamba, the fact remains that it has never become operational. The reasons for its not having become operational is not relevant in the matter before us. The relevant regulations concerning the periods within which the licences must become operational apply, unless ICASA is approached for an exemption. This was not done.

### **ADDRESSING THE ISSUES**

[6] The first issue is whether the licences of Ukhahlamba should not be declared to have ceased to exist as a result of the fact that the licensee has never operated since the licences were issued. Regulation 5 of the *Regulations Regarding Standard Terms and Conditions for Individual Licences under Chapter 3 of the Electronic Communications Act, 36 of 2005* provides as follows in Schedule 2 :

(1) A Licensee must commence operation of the ECS specified in the Licence within six 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 six months.

(2) Where a Licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or longer, a Licensee must notify the Authority in writing of such circumstances within twenty four (24) hours of the occurrence thereof.

An identical regulation applies to the ECNS, except that a period of 12 months is granted in that case.

[7] There is no doubt that the licensee has never operated under the licence. Omissions to file financial statements and contribute USAF fees are, accordingly not relevant and, in so far as these alleged omissions are concerned, no finding is made against the licensee. The licence has, however, lapsed by operation of law. There was never an application for any condonation of these time periods. In any case, according to Mr Mnyengo, the members have lost interest.

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<sup>2</sup> Note: Ms Mohlala was a Councillor, not the Chairperson.

## **PROPOSED ACTION BY COUNCIL**

[8] In the present matter a sanction in terms of section 17E(2) of the ICASA Act is not competent since the licences never became operational. However, Council is advised to make a declaratory order that the licenses issued to Ukhahlamba have ceased to exist.

[8] If this advice is followed, Council is advised to issue the following notice in the *Government Gazette*:

**The Independent Communications Authority of South Africa issues the following declaratory order in regard to the licences referred to hereunder. The licences were issued on 31 August 2008 to Ukhahlamba Communications (Pty) Ltd of physical address 19 Van Riebeeck Street, Maclear.**

**That the following licences in the name of the said company have ceased to exist as from the dates indicated hereunder:**

- 1. Individual Electronic Communications Service Licence issued on 31 August 2008 ceased to exist as from midnight 28 February 2009.**
- 2. Individual Electronic Communications Network Service Licence issued on 31 August 2008 ceased to exist as from midnight 31 August 2009.**



Prof JCW Van Rooyen SC  
Chairperson

29 September 2015

Councillor N Batyi, Ms N Maseti, Prof. K Moodaliyar and Mr J Medupe concurred with the judgment on the merits and the proposed declaratory order by Council.



