

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

Date of Meeting: 10 NOVEMBER 2016

CASE NUMBER 164/2016

IN RE: VOIZACOM (PTY) LTD

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

From the Office of the Coordinator: Attorney Meera Lalla

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On 20 September 2005 the Independent Communications Authority of South Africa (“ICASA”) issued a Value Added Network Services Licence to Voizacom (Pty) Ltd (“Voizacom”). On 28 March 2009 the said licence was converted to an Electronic Communications Network Service Licence and an Electronic

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<sup>1</sup> 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.

Communications Services Licence by the Independent Communications Authority of South Africa (“ICASA”). 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 Voizacom had not filed financial statements for the financial years 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2010-2011 and 2011-2012 and that no contribution had been made in terms of the Universal Service and Access Fund (“USAF”). Although this reference was signed and the year 2013 appeared under the reference, the specific date was not mentioned. On the 3<sup>rd</sup> October 2013, however, a letter from Compliance was directed at the licensee. This letter only referred to the omission to make USAF contributions. The Coordinator’s Office referred the matter to Voizacom on the 7<sup>th</sup> June 2015. We will, accordingly, limit this matter to the non-payment of USAF contributions. It should be mentioned that in an affidavit dated 22 July 2013 a Mr Ferreira from Voizacom indicated that a financial statement was filed for the year 2011-2012, but that no confirmation for this submission had been received from Compliance. This was not disputed and the letter from Compliance dated 3 October 2013 accords with this statement in that only the omission to pay USAF fees was ultimately placed in dispute.

[2]The relevant USAF Regulations under which the reference was made are from February 2011, which repealed the earlier regulations in this regard. In so far as the financial years before 2011-2012 are concerned, the CCC is not constitutionally empowered to hear the matters. The Constitution of the Republic of South Africa<sup>2</sup> does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>3</sup> Thus, only the contravention relating to the non-payment of the 2011-2012 USAF fees is before the CCC.

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<sup>2</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>3</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.

[3] On the 27<sup>th</sup> June 2016 Voizacom answered the letter from the Coordinator's Office by way of an affidavit, which contained a copy of emails between Voizacom and ICASA from 30 April 2013 to 30 May 2016.

All outstanding documentation and fees were duly paid and Compliance (ECS and ECNS Licences) recommended to the CCC that a desist order would be a fitting order for the CCC to send to the Council of ICASA for consideration as a sanction against Voizacom.

## **NON-COMPLIANCE**

[4] Even if the payment has now been made, the CCC must nevertheless consider the omission and decide whether a finding should be made against Voizacom in terms of the USAF Regulations.

[5] A high standard of compliance is expected from a licensee and this was lacking in the present case. In *S v Waglines Pty Ltd and Another*<sup>4</sup> Judge Didcott held that "ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*" To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice. Compare *S v Longdistance Natal Pty Ltd*<sup>5</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

"*Mens rea*<sup>6</sup> in the form of *culpa*<sup>7</sup> is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

[6] Thus, even if Voizacom has paid its fees and has rectified the omission before us (and is, in fact, up to date) it must nevertheless be found to have been in

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<sup>4</sup> 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

<sup>5</sup> 1990 (2) SA 277 (A).

<sup>6</sup> Translated: "a guilty mind".

<sup>7</sup> Translated: negligence.

contravention of the 2011 USAF Regulations for not having paid the amount due in time. It was clearly negligent in its omissions. As a licensee Voizacom should at least have obtained legal advice as to its obligations in the light of the judgments referred to above. The Regulations require a *licensee* to determine its USAF contribution at 0,2% of its annual turnover and that payment must be made within six months from its financial year end, without awaiting an account from ICASA. The fact that it has, at this stage, paid all its outstanding fees and filed all financial statements is an extenuating circumstance in the consideration of the sanction which we should consider in our advice to Council.

### **FINDING ON THE MERITS**

[7] Voizacom (Pty) Ltd is, accordingly, found to have been in breach of the February 2011 USAF Regulations by not having paid its USAF fees for 2011-2012 in time.

### **ADVICE TO THE ICASA COUNCIL AS TO SANCTION**

[8] In the light of the fact that there is no evidence before the CCC that Voizacom was *mala fide* in its omission to pay USAF fees for the 2011- 2012 financial year and, in any case, is also up to date with all its financial duties up to 30 June 2016, it is not necessary for Council to issue more than a desist order in terms of section 17E (2)(a) of the ICASA Act. That sub-paragraph provides as follows:

“The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

(a) direct the licensee to desist from any further contravention;

**The order of Council, it is advised, should read as follows:**

**Voizacom (Pty) Ltd is ordered to desist in future from not paying its USAF contributions, as prescribed, within six months after its financial year end.**

The said order is legally enforceable, should it be breached in future.<sup>8</sup>

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<sup>8</sup> See section 17H(1)(f) of the ICASA Act 2000 as amended.

*J. C. W. van Rooijen*

10 November 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.

**ADDENDUM OF USAF REGULATIONS 2011**

## 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.



