

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

Date of Meeting: 8 April 2016

CASE NUMBER 149/2015

IN RE: WINNOWING INTERNET SERVICE PROVIDER CC

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

In attendance From the Office of the Coordinator: Ms Meera Lalla

Coordinator: Ms Lindisa Mabulu

---

## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] On 21 July 2009 Winnowing Internet Service Provider cc (“Winnowing”) was issued with a Class Electronic Communications Service Licence by the

---

<sup>1</sup> 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.

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 Winnowing had not filed financial statements for the financial year-ends 2010 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 from 2011.<sup>2</sup> 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> The allegation of omissions was sent to the licensee by the CCC Coordinator in 2013. Thus, only the contraventions relating to the non-submission of the 2012 and 2013 year-ends are before the CCC. The earlier omissions are, accordingly, not before the CCC since they relate to a date before the 2011 Regulations became operative, including year-end 2011, which would be February 2011. A Notice in the Government Gazette of 26 April 2013 informed licensees to file financial statements and that Notice must be read with regulation 9(1) of the Class Regulations in the Addenda to this judgment. Fines may be imposed in terms of Regulation 12.

[3] The earlier debts, however, remain intact and were, in any case, all paid by Winnowing after this matter was brought to its notice. In so far as the later debts are concerned, the statements were all filed and all payments made.

## **NON-COMPLIANCE**

[4] 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>5</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

---

<sup>2</sup> USAF = February 2011 and the other one September 2012 – see the Addenda to this judgment.

<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.

<sup>5</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.

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>6</sup> where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*<sup>7</sup> in the form of *culpa*<sup>8</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.)

[5] Thus, even if it were to be accepted that Winnowing did not know or simply omitted to file financial statements and pay its licence fees and had rectified all the omissions, it must still be found to have been in contravention of the 2011 Regulations (see the addenda to this judgment) for not having filed its year-end 2012 and 2013 financial statements and the amounts due for USAF and licence fees. As pointed out, the present charge, constitutionally, only relates to the 2012 and 2013 year-end financial statements and the 2012 and 2013 USAF fees and licence fee. As a licensee Winnowing should at least have obtained legal advice as to its obligations in the light of the judgments referred to above. It has, according to the documentation before us, done so now. The fact that it has, at this stage, paid all its outstanding fees and filed financial statements up to year-end 2015<sup>9</sup> is an extenuating circumstance in the consideration of the sanction which we should consider in our advice to Council on sanction.

[6] Winnowing is, accordingly, found to have been in breach of the Regulations, as in the Addenda to this judgment by not having filed its financial statements and paid its USAF-fees and licence fee for the year-ends 2012 and 2013.

---

<sup>6</sup> 1990 (2) SA 277 (A).

<sup>7</sup> Translated: “a guilty mind”.

<sup>8</sup> Translated: negligence.

<sup>9</sup> See the email dated 2 November 2015 from ICASA’s Moroba A. Teffo.

## ADVICE TO THE ICASA COUNCIL AS TO SANCTION

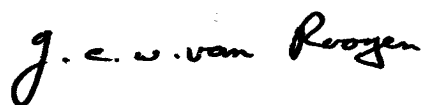
[7] In the light of the fact that Winnowing was *bona fide* in its omission to file the financial statement and pay licence and USAF fees for 2012 and 2013 year-ends and also, in any case, paid all its dues up to 2015, it is not necessary to issue more than a desist order in terms of section 17E(2)(a) of the ICASA Act. That subparagraph provides as follows:

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

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

**Winnowing Internet Service Provider CC is ordered to desist in future from not filing its financial statements and paying its USAF fees and licence fees, as prescribed.**

The said order is legally enforceable, should it be breached in future.<sup>10</sup>



22 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.

---

<sup>10</sup> See section 17H(1)(f) of the ICASA Act 2000 as amended.

## **ADDENDUM: RELEVANT REGULATIONS**

### **STANDARD TERMS AND CONDITIONS FOR CLASS ELECTRONIC COMMUNICATIONS SERVICES 2010**

Commencement of GN R525: 12 September 2011

#### **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);

**“Authority”** means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

**“BS”** means a broadcasting service as defined in section 1 of the Electronic Communications Act 2005 (Act No. 36 of 2005);

**“Effective date”** means the date on which the Licence is issued;

**“Public Service Announcement”** means an announcement broadcast by a broadcasting service licensee aimed at imparting knowledge or information concerning a disaster or immediate grave danger to the public or in the interests of public welfare;

**“Licence”** means the Class Broadcasting Service licence issued to the Licensee in the form contained in Annexure A of these regulations;

**“Licensee”** means a person named in the licence and issued with a licence to provide services in terms of Chapter 3 of the Act.

#### **2. Notification of change in licensee details and information**

- (1) A Licensee must submit written notice to the Authority within seven (7) days of the occurrence of the following changes:
  - (a) the name of the Licensee;
  - (b) contact details including the contact person;
  - (c) shareholding;
  - (d) physical address; and
  - (e) financial year end.

**3. Licence area**

- (1) The licence area is a district or local Municipality as defined in the Local Government Municipal Structures Act, No 117 of 1998.
- (2) A Licensee must provide services within its licence area.

**4. Duration of the licence**

The Licence is valid for ten (10) years from the effective date.

**5. Commencement of operations**

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

**6. Hours of operations**

- (1) A Licensee must provide electronic communication services for twenty four (24) hours per day unless the Authority has been notified of a shorter schedule of daily broadcast operations.
- (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, the licensee must notify the Authority in writing of such circumstances within twenty four (24) hours.

**7. Services to be provided by the licensee**

The licensee must provide ECS by means of an ECN operated by an ECNS licensee.

**8. Safety measures**

The Licensee must, in respect of all apparatus, equipment and installations that it owns, leases or uses, take reasonable and necessary safety measures to safeguard life or property, and limit exposure to electromagnetic emission, radiation and related risks.

**9. Provision of information**

- (1) The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide any information including documents or books not ordinarily required, so as to enable it to:
  - (a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;
  - (b) allow for the assessment and allocation of applicable fees and related requirements;
  - (c) facilitate the efficient use of radio frequency spectrum; and
  - (d) collect and compile information to be used for research purposes, planning, reporting and conducting inquiries.
- (2) In respect of each information request referred to in sub-regulation (1), except where otherwise addressed in applicable regulations, the Authority will provide, among other things, detailed specifications of its information request, applicable response times and a contact person to whom queries may be addressed.
- (3) A licensee must provide the information in accordance with such format as may be prescribed by the Authority.
- (4) In the event where a Licensee or its representative refuse or fail to provide the Authority with requested information in terms of sub-regulation (1), the Authority may, after reasonable attempts, refer the matter to the Complaints and Compliance Committee.

[Reg. 9 substituted by Gen N 155/2016]

**10. Publication of tariffs and fees**

- (1) A Licensee may not provide any service for a charge, fee or other compensation, unless the price(s) for the service and other terms and conditions of the provision of such service.
  - (a) have been made known by:

- (i) making such prices and terms and conditions available for inspection at its offices during business hours; and
    - (ii) providing such details to anyone who requests same at no charge.
  - (b) have been filed with the Authority at least seven(7) days prior to the provision of the said service. In making such a filing, a Licensee must utilise a format approved by the Authority in writing.
- (2) A Licensee must provide to the Authority on a bi-annual basis, a record of the actual services provided and the actual tariffs charged thereof during the previous six months.

#### **11. Metering and billing arrangements**

- (1) A Licensee must install and operate metering and billing systems which accurately record the extent of the service(s) provided to any end-user.
- (2) A Licensee must provide an accurate invoice with a detailed statement of services rendered to any end-user at no charge, except where the end-user obtains services exclusively on a prepaid basis and the prices and terms of such prepaid service have been disclosed at the time of purchase.
- (3) The invoice must include information for the entire period covered by such invoice as follows:
  - (a) details of services rendered to the end-user; and
  - (b) breakdown of charges associated with such services.
- (4) Upon request by an end-user, the Licensee must provide an itemised bill, which contains a sufficient level of detail to allow verification of charges incurred in using the services provided by the licensee.
  - (a) Each detailed itemised bill shall contain at least the following information in relation to each individual transaction (voice or data call) charge incurred by the subscriber during the relevant billing period:



- (1) destination,
- (2) dialed number,
- (3) date,
- (4) time,
- (5) duration; and
- (6) charge for each individual transaction.

(b) The detailed itemised bill must be provided:

- (i) via post or in an electronic format; and
- (a)(ii) at such a price that takes into account the difference in the mode of delivery.

## **12. Contraventions and penalties**

Any person that contravenes these Regulations is liable to a fine not less than R2 500, 00 (Two thousand, five hundred Rand) but not exceeding R100 000, 00 (One hundred thousand Rand).

[Reg. 12 substituted by Gen N 155/2016]

## **13. Short title and commencement**

These regulations are called the Standard Terms and Conditions for Class Electronic Communications Services 2010, and will come into operation by notice in the Gazette.

## **14. Repeal of regulations**

These regulations repeal Government Gazette No. 30530 containing the Standard Terms and Conditions for Class licences published in Notice 1138 of 30 November 2007 in its entirety

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

**ICASA GENERAL LICENCE FEES REGULATIONS 2012**

**Section 7(1): Contraventions and penalties**

(1) Failure to pay the annual licence fees will result in the suspension of the licence issued by the Authority in terms of Chapter 3 of the Act until such time that the annual licence fees, plus interest, are paid in full.

(2) Failure to comply with any other provision in these regulations will result in a fine not exceeding one million rand (R1 000 000.00).