

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

Date of Hearing: 8 June 2018

Case Number: 277/2018

**IN RE: WALKING ON WATER TELEVISION (PTY) LTD**

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

**For Broadcasting Compliance: Ms Fikile Hlongwane (Presently Senior Manager Licensing) and with her Ms Busiziswe Mashigo from Broadcasting(Compliance) From the Broadcaster: Mr Luyanda Mangquku (Chief Financial Officer) and Ms Nontokozo Mangquku (CEO)**

**Acting Coordinator: Ms Meera Lalla (Attorney)**

**Coordinator: Ms Lindisa Mabulu**

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### **JUDGMENT**

**JCW VAN ROOYEN SC**

#### **INTRODUCTION**

[1] Walking on Water Television (Pty) Ltd (“WoWtv”) was issued with a Commercial Subscription Television and Sound Broadcasting Service licence by the Independent Communications Authority of South Africa (“ICASA”) on 15

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<sup>1</sup> An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA or, in the present matter, references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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. Also where a complaint is not upheld, the matter is referred to Council.

March 2011. The service would, as provided in its licence, amount to an encrypted subscription broadcasting service. The licensee would also, according to its licence, use the services of an electronic communications network service licensee. The language of broadcast would be left to the discretion of the licensee. The license also requires that national coverage be provided.

Added, was the following:

*The licensee is licensed to provide a subscription broadcasting service aimed at [a] niche market. The licensee shall provide [a] God based service which targets all people without exception.*

[2] The charge before the CCC is that WoWtv has contravened Regulation 5(c) Schedule 2 of the Regulations Regarding Standard Terms and Conditions for Individual licences (as published in Government Gazette Number 33294 on 14 June 2010), which was operational from 11 September 2011.

Regulation 5(c) provided as follows:

*A Licensee must commence operation of the broadcasting service specified in the Licence within the following periods, unless the Authority grants, on good cause shown, an extended commencement period on written application, prior to the expiry of the period referred to in sub-clause(a) and (b) and (c) below:*

...

*(c) **twelve (12) months** from the effective date in respect of [a] subscription Broadcasting Service. (emphasis added)*

## LEGAL QUESTION

[3] On the 26<sup>th</sup> of March 2016 the 12 month period to commence broadcasting was, however, as set forth in the 2016 Amended Regulations, replaced by 24 months. At the time of laying the charge (31 January 2018) before the CCC, the period had, thus, already been extended per regulation with twelve months. The legal question which, thus, arises is whether any charge filed after the amendment to 24 months, even if it pertained to the period before the amendment to the Regulations, may legally be filed after the amendment had already been made and had been operational for 22 months. The Constitution of the Republic of South Africa<sup>2</sup> does not permit charges to be brought under

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<sup>2</sup> See section 35(3) (l) of the Constitution. 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]. A judgment of Mahomed J, the later Chief Justice, in *S v Mhlungu & Others* 1995(3) SA 867(CC) demonstrates how pervasive constitutional values must be – and that would, of course, include section 35(3)(l) of the Constitution of the Republic of South Africa.

repealed legislation, unless a charge was initiated while such legislation was still in operation.<sup>3</sup> It would not be disputed that the charge was laid well after the amendment.

Section 12 of the Interpretation Act 33 of 1957 – which deals with amendments to legislation - does not lead to a different result.<sup>4</sup>

Since the charge does not reflect the legislation as it stood when the charge was laid, it cannot, with respect, be upheld.

**The charge is, accordingly not upheld**

### **APPLICATION THAT THE CCC SET ASIDE THE RESOLUTION OF ICASA NOT TO GRANT THE RESPONDENT THE GERMAN CHANNELS**

[4] In its written documentation submitted to the CCC WoWtv requested the CCC to set aside the decision of ICASA to grant DEUKOM the right to broadcast, what was termed, the “27 German channels”. WoWtv had unsuccessfully applied to ICASA to add the said 27 channels to its offer to the public.

The CCC is not authorised by law to review a resolution of the Council of ICASA. That is a function which is entrusted to the High Court. Section 4(5) of the ICASA Act 2000 provides as follows in this regard:

A person affected by any action, finding or decision of the Authority may apply to a court with competent jurisdiction for review of that action, finding or decision.

**The application to set aside the award of 27 German Channels by ICASA is, accordingly, not upheld on the basis that the CCC does not have jurisdiction in such a matter.**

### **RECOMMENDATION TO COUNCIL IN TERMS OF SECTION 17B(b) OF THE ICASA ACT AS TO ITS FUNCTIONS**

[5] Much has happened since the licence was issued to WoWtv on 15 March 2011:

*firstly* after the 12 months term within which the said licence had to be made operational under the original 2010 Regulations (effective from September 2011) and

*secondly*, after the Regulations were amended, as from 26 March 2016.

It would, in the CCC’s view, thus not be fair to the Licensee to end the judgment here. With the benefit of having heard what the two executives from WoWtv argued before the CCC, it is believed that a *recommendation* in terms of section

17B(b) of the ICASA Act should be made to the Council of ICASA in regard to the future of WoWtv.

[6] Given the fact that the charge, dated 31 January 2018, was based on the 12 months term, it would be fair to accept that the approach of Compliance in regard to WoWtv (also after 26 March 2016) was based on the (repealed) 12 months operational requirement.

[7] It would thus be fair to the licensee to grant it more time to get its house in order. In argument by the Respondent before the CCC it was clear that the executive was *bona fide* working towards activating its broadcasts. Although it might have been believed that communication over the internet amounted to broadcasting, that thinking is not supported by the definition of “broadcasting” in the ECA.<sup>5</sup> The unsuccessful application to add the 27 German channels had, clearly, also been a substantial setback for WoWtv.

[8] It was further clear to the CCC that although WoWtv had stated that it would provide a “God based” service, it was not what could be classified as a religious channel. The fact that it stated in its application (repeated in its licence) that the content would be “God based” is not a limitation to broadcast only religious sermons and the like. The word “God-based” is not, within the context, an ideal which has any consequence in *law*.<sup>6</sup> WoWtv is, accordingly, in law, not a religious channel and is permitted to broadcast freely within the limits set by the Code of Conduct for Subscription Broadcasters, the ECA, the relevant ICASA Regulations and the Advertising Code.<sup>7</sup> In fact, its licence also states that its service shall target *all* people without exception. The reference to a “niche” service should, it is advised, be understood as a limitation to providing a *subscription* network.

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<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. Section 12 of the Interpretation Act also does not give life to the charge. In any case, the Constitutional principles enunciated in the judgments referred to in footnote 2 are decisive.

<sup>4</sup> The significant judgment of Mohamed J in *S v Mhlungu & Others* 1995(3) SA 867(CC) at especially paras [27], [32] and [33] demonstrates the importance of the 1994 Constitution of the RSA well, also in regard to section 12 of the Interpretation Act 1957, as amended.

<sup>5</sup> See section 1 of the Electronic Communications Act 2005 (“ECA”): “broadcasting service”, “broadcasting service radio frequency bands”, “broadcasting service licence”, “broadcasting signal distribution”.

<sup>6</sup> The words on the USA dollar : “In God we Trust” have been held not to amount to being in conflict with the United States government not being permitted to establish a religion. Cf *New Doe Child and Others v Congress of the US of America* (argued 16 June 2017 and judgment handed down on 29 May 2018 (US Court of Appeals (6<sup>th</sup> Circuit) No 16-4345. Also compare *Speaker of the Western Cape Provincial Legislature, Ex p: In re Certification of the Constitution of the Western Cape* 1997 (4) SA 795 (CC).

<sup>7</sup> See sections 54 and 55 of the ECA.

The licence also explicitly states that the licensee may decide on the language of broadcasts itself.

[9] It is suggested that the approach of the Authority, in the light of the background to this matter, should also be in line with the spirit of *ubuntu*, which was defined by Mahomed J (the later Chief Justice) as follows in *S v Makwanyane and Another* 1995 (3) SA 391 (CC):

(A) need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization. The need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'

There are several other judgments which have also given substance to the concept of *ubuntu*.<sup>8</sup> Generally the concept is understood as requiring a more humane application of law. The directors who appeared before the CCC have demonstrated their *bona fides*. Had the German Channels been awarded to them they would, in their opinion, probably have been on air. They have, however, clearly not given up on the project and the CCC believes that they have demonstrated that, given the necessary time frame, they would indeed be on air.

[10] Although the extended 12 months terms in fact came to an end before 26 March 2016 (when the term was extended to 24 months by an amendment to the Regulations), circumstances had, according to the argument before the CCC, changed considerably after the application for the 27 German channels had not been successful. The two Directors argued before the CCC that to place three or four choices before a viewing public, where the competition provides

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<sup>8</sup> Inter alia, see *Everfresh Market Virginia (PTY) Ltd v Shoprite Chreckers(Pty) Ltd* 2012(1) SA 256(CC); *Road Accident Fund v Mohohlo* 2018(2) SA 65(SCA).

numerous channels to choose from, would be disastrous for WoWtv, from a business angle. The station, thus, requires more time.

[11] The answer of WoWtv to the charge before the CCC is also relevant in this advice.

(a) The license was issued on 15 March 2011.

(b) On the 13<sup>th</sup> March 2012 WoWtv applied for its first twelve months extended commencement period. This was approved by the Authority on 2 October 2012.

(c) On the 2<sup>nd</sup> September 2013 WOVTV submitted its application for a second extended commencement period for a further 12 months. ICASA responded by granting the extension on the 5<sup>th</sup> November 2013 and it was specified that the extension was from the said date. The decision, however, only reached WoWtv on the 20<sup>th</sup> January 2014.

(d) On the 6<sup>th</sup> November 2014 WoWtv informed ICASA of its scheduled official launch on the 1<sup>st</sup> December 2014. Testing would commence on the 7<sup>th</sup> November 2014.

Even if the commencement amounted to a broadcast, it was clearly not successful in the sense that it continued.

#### **FINDING BY THE CCC ON THE MERITS OF THE CHARGE**

**[12] As stated in paragraph [3] above, the charge against WoWtv is not upheld.**

**[13]WoWtv's application to set aside the decision of ICASA not to grant it the 27 German Channels is not acceded to. The CCC does not have jurisdiction to set aside a decision by the ICASA Council.**

#### **ADVICE BY THE CCC TO COUNCIL IN TERMS OF SECTION 17B(b) OF THE ICASA ACT**

**[14] Given the circumstances and legal perspective sketched above it is advised, in terms of section 17B(b) of the ICASA Act, that the Council of ICASA**

consider granting WoWtv 90 working days from the issue of this judgment to file a Report to it via Compliance (Broadcasting) ICASA as to:

- (a) Its detailed future plan from a business and operational perspective;
- (b) The date on which it plans to be providing the required broadcasting service.

It is submitted that such a Report would contribute towards placing Council in a more informed position in regard to its future approach to WoWtv.



JCW van Rooyen SC

6 August 2018

The CCC members agreed with the above findings and advice to Council.