

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Meeting: 10 NOVEMBER 2016

CASE NUMBER 177/2016

IN RE: ZULULAND WIRELESS NETWORKS CC T/A ZWN

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

From the Office of the Coordinator: Adv. L Myeza.

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] On 19 February 2010 Zululand Wireless Networks cc t/a ZWN (“ZWN”) was issued with a Class Electronic Communications Network Service Licence and a

¹An 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.

Class Electronic 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 ZWN had not filed financial statements for the financial years 2010-2011, 2011-2012 and 2012-2013, 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 2011.² In so far as the year 2010-2011 is concerned, the CCC is not constitutionally empowered to hear the matter. The Constitution of the Republic of South Africa³ does not permit charges to be brought under repealed legislation, unless a charge was initiated while such legislation was still in operation.⁴ Thus, only the contraventions relating to the non-submission of the 2011-2012 and 2012-2013 financial statements are before the CCC. The same principle applies to the payment of USAF fees and licence fees. Earlier omissions are, accordingly, not before the CCC since they relate to dates before the 2011 Regulations became operative, including the year 2010-2011. As would appear from the documentation, financial statements were also not filed for years after 2012-2013. These years are also not before the CCC for purposes of this hearing.

[3] Ultimately, after this matter was initiated before the CCC, the licensee did file the relevant financial statements and pay the USAF fees plus interest. Annual Licence fees were not payable in terms of the Regulations which applied at the time.

[4] The duty to file financial statements was published in the Government Gazette in 2011, 2012 and 2013 and copied on the ICASA Website. The Notices called upon licensees to file financial statements with ICASA. These Notices were published in accordance with the Relevant Class Regulations which authorize ICASA to require information from licensees.⁵ The Notices were necessary to

² USAF = February 2011 and the other two, September 2012 – see the Addenda to this judgment.

³ 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].

⁴ 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.

⁵ Regulation 8.

trigger the possible fines in terms of the September 2011 Network Regulations. As will appear from the attached Regulations, omissions to file financial statements and pay USAF contributions and licence fees attract fines which could, under aggravating circumstances, be quite substantial.

NON-COMPLIANCE

[5] Even if the statements have now been filed and the debts paid, the CCC must, however, nevertheless consider the omissions and decide whether a finding should be made against ZWN in terms the Class Regulations as set out in the Addendum to this judgment. Both the non-filing of financial statements for 2011-2012 and 2012-2013 plus the omission to pay USAF contributions and licence fees are formally before the CCC (the other omissions, as mentioned, are not before us formally).

[6] 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*⁶ 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*⁷ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*⁸ in the form of *culpa*⁹ 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 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.

⁷ 1990 (2) SA 277 (A).

⁸ Translated: “a guilty mind”.

⁹ Translated: negligence.

[7] Thus, even if ZWN has paid its fees and has rectified the omissions, it must still be found to have been in contravention of the 2011 Regulations for not having filed its 2011-2012 and 2012-2013 financial statements and paid the amounts due for USAF. It was clearly negligent in its omissions. As a licensee ZWN should at least have obtained legal advice as to its obligations in the light of the judgments referred to above. The fact that it has, at this stage, paid all its outstanding fees and filed financial statements up to for the year 2012-2013 is an extenuating circumstance in the consideration of the sanction which we should consider in our advice to Council.

FINDING ON THE MERITS

[8] ZWN is, accordingly, found to have been in breach of the September 2011 Class Regulations and the 2011 USAF Regulations by not having filed its 2011-2012 and 2012-2013 financial statements and not having paid USAF fees. No licence fees were payable and, accordingly no finding in this regard is made against ZWN.

ADVICE TO THE ICASA COUNCIL AS TO SANCTION

[9] In the light of the fact that there is no evidence before the CCC that ZWN was *mala fide* in its omission to file the financial statements and pay USAF fees for the years 2011-2012 and 2012-2013 and, in any case, has also now paid all its dues, it is not necessary 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:

Zululand Wireless Networks cc t/a ZWN is ordered to desist in future from not filing its duly confirmed financial statements, as prescribed, within six months after its financial year end and also, as prescribed, not paying its USAF contributions when due.

The said order is legally enforceable, should it be breached in future.¹⁰

J. C. W. van Rooyen

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.

See the Addendum to this Judgment for the relevant Regulations.

¹⁰ 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 indicated otherwise:

“**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);

“**ECS**” means an Electronic Communications Services as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECN**” means an Electronic Communications Network as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

“**ECNS**” means an Electronic Communications Network Service as defined in the Electronic Communications Act; 2005 (Act No. 36 of 2005);

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

“**Licence**” means the Class Electronic Communications Network Service Licence issued to the Licensee in the form contained in Annexure C of these regulations;

“**Licensee**” means the 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.
[Subr. (1) substituted by Gen N 155/2016]

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.
[Reg. 3 substituted by Gen N 155/2016]

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.
[Reg. 5 substituted by Gen N 155/2016]

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 subregulation (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 subregulation (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 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.