IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 2013/11814

In the matter between: -

WIRELESS BUSINESS SOLUTIONS (PTY) LIMITED Applicant

and

THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA Respondent

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J U D G M E N T

MUNDELL, AJ: -

[1] The genesis of this application was an urgent application enrolled for hearing on 5 April 2013. In Part A of the notice of motion the applicant sought urgent relief to direct the respondent to return to it certain equipment as well as to interdict and restrain the respondent from interfering with the applicant's use of certain radio apparatus to transmit and/or receive radio signals on certain defined frequencies ("the operation of the network"). That relief was to pend the outcome of the main relief sought in Part B.

[2] On 5 April 2013 Vally J in effect granted Part A of the notice of motion. Paragraph 3 of Vally J's order records that the interim relief would lapse on 1 June 2013. On 14 May 2013 Boruchowitz J gave an order which directed that the matter be heard by agreement on Monday 10 June 2013 together with certain ancillary directions relating to the delivery of affidavits. Boruchowitz J extended the interim relief to 29 June 2013.

[3] The applicant is the provider of internet connectivity services to various individual consumers and corporate subscribers and is engaged in the operation of the network. The respondent, on the other hand, is a juristic person established in terms of Section 3(1) of the Independent Communications Authority of South Africa Act, 13 of 2000 *("the ICASA Act").* In terms of Section 4(3)(b) of the ICASA Act, the respondent, amongst others, is required to monitor the electronic communications sector to ensure compliance with the ICASA Act and the underlying statutes. The *"underlying statutes"* in turn are defined to mean the Broadcasting Act, the Postal Services Act and the Electronic Communications Act.

[4] The ICASA Act makes provision for the appointment by the respondent of suitably qualified inspectors to perform the functions provided for in that Act (Section 17F). An inspector is, in terms of the provisions of Section 17F(5)(c) authorised to investigate and evaluate any alleged or suspected non-compliance by a licensee with its license terms and conditions. For that purpose, an inspector is *"at any reasonable time*

without prior notice and on the authority of a warrant" entitled to enter upon any premises, search that premises and seize for further examination or safe custody any document or thing which has a bearing on any alleged non-compliance with the Act.

[5] The contemplated warrant is one issued by a Magistrate or a Judge in terms of Section 17G(4)(a) of the ICASA Act, the requirement being that it must appear to the Magistrate or Judge, from information furnished to him or her on oath or affirmation, that there are reasonable grounds for believing that a document or thing which has a bearing on the alleged non-compliance with the provisions of the Act is or will be in the possession or under the control of any person or on or in any premises within the area of jurisdiction of that Magistrate or Judge and cannot otherwise reasonably be obtained.

[6] Section 31 of the Electronic Communications Act, 36 of 2005 is in the following terms:

> *"31* ***Radio Frequency Spectrum License***
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> *(1) Subject to sub-sections (5) and (6), no person may transmit any signal by radio or use radio apparatus to receive any signal by radio except under and in accordance with the radio frequency spectrum license granted by the Authority to such person in terms of this Act."*

[7] The authority referred to in the afore-quoted provision is the respondent.

[8] The centre-piece of the debate in this application is whether the applicant is operating in contravention of Section 31(1) of the Electronic Communications Act. The relief sought in the notice of motion is to be seen in that context.

[9] In close association with Section 31(1), Section 32(1)(a) of the Electronic Communications Act provides that no person may possess any radio apparatus unless he or she is in possession of a radio frequency spectrum license granted in terms of that Act.

[10] The relief sought in Part B of the notice of motion is, firstly, for a declaratory order that the applicant is licensed to operate the network on six frequency spectrums.[1]

[11] In paragraph 2 of Part B the applicant asks for an order reviewing and/or setting aside the suspension or cancellation of its license by the respondent. Paragraph 3 moves for the setting aside of a warrant issued by Claassen J on 7 March 2013. Both paragraphs 2 and 3 are sought *"To the extent necessary"*. That qualification is inserted as the relief sought in paragraphs 2 and 3 is conditional upon the failure of that sought in paragraph 1.

[12] The warrant authorised by Claassen J permitted the search of certain defined premises occupied by the applicant and the seizure of: *"All electronic communications facilities/electronic communications network/ electronic communications network service, with all associated*

[1] They are: 1GHz; 5.9GHz; 10.5GHz; 26GHz; 2.6GHz and 1800 MHz GSM

peripheral equipment, utilised in the transmission and/or receiving of radio frequencies in the specified spectrums." The warrant was executed on 3 April 2013. It is the equipment seized pursuant to that execution which the respondent was directed to return to the applicant in terms of paragraph 2.1 of Vally J's order of 5 April 2013. The warrant was issued in terms of Section 17G(iv)(b) of the ICASA Act.

[13] The relief sought in paragraph 1 of the notice of motion (Part B) is predicated on the fact that the respondent had not taken a decision to suspend or cancel the applicant's licenses so that those licenses remain valid. The relief sought in paragraph 2 of the notice of motion is premised on the assumption that the respondent had decided to suspend or cancel the applicant's license.

[14] The respondent disavows any such decision. In the heads of argument delivered on the respondent's behalf by Mr Kennedy SC, the opposition to the relief sought in paragraph 2 of the notice of motion is put in the following terms:

> *"18 Prayer Two, which seeks to review and set aside 'the suspension or cancellation of a license' is likewise misconceived. ICASA (the respondent) has not taken any decision to suspend or cancel a license. The previous licenses are deemed to have lapsed due to non-payment."*

[15] That argument was legitimately based on the contents of the respondent's answering affidavit in paragraph 26 whereof the deponent,

Dr Mncube, said:

"Regarding Prayer Two of Part B of the notice of motion, namely the prayer for the review and/or setting aside of the alleged suspension or cancellation of the relevant licenses, the respondent has not taken any decision to suspend or cancel any of the six licenses."

[16] A decision on the part of the respondent to either cancel or suspend the applicant's six licenses would constitute administrative action as defined in Section 1 of the Promotion of Administrative Justice Act, 3 of 2000. The applicant has not, in support of the conditional relief sought in paragraph 2 of Part B of the notice of motion, sought to invoke the provisions of that Act. In the result, no case is made out in support of paragraph 2 of Part B of the notice of motion.

[17] For its part, the applicant admits that it is liable to make payment of the prescribed license fees, and that it is in arrears in those payments. The applicant contends that:

[17.1] a dispute between it and the respondent endures concerning the amount of the fees payable;

[17.2] there are continued negotiations between the applicant and the respondent concerning that which is allegedly owing by the latter to the former.

[18] The applicant suggests that, in the face of those disputes and negotiations, the respondent had not taken a decision to cancel the applicant's license

and, in any event, conducted itself in such a manner as to lead the applicant to believe that, pending resolution of the disputed license fees, the licenses would remain valid.

[19] I do not intend to relate the entire history of the dispute between the applicant and the respondent in the context of the license fees owing. The following portions of that debate are relevant:

[19.1] in a letter dated 27 February 2012 addressed by Mr Thami Mtshali[2] to Dr Stephen Mncube,[3] Mtshali recorded the applicant's contention that the sum then owing by it to the respondent was R8 479 391.66;

[19.2] payment of that amount was not, however, tendered by the applicant. It proposed to the respondent that it would effect payment in twelve equal instalments, the first payment to fall due within seven days of the respondent's approval of that submission;

[19.3] no apparent resolution of the dispute was achieved and, on 5 December 2012, Mlindi Kgamedi[4] again addressed Dr Mncube in terms which included the following paragraph:

"We urgently need to get an indication from your goodselves as to your attitude on our proposal. You may recall that we have proposed that we make a payment of R1 000 000.00 (One million Rand) towards the license fees that are outstanding and that this

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2 The applicant's Chief Executive Officer
3 The respondent's Chairperson
4 Described to be the applicant's Executive Head – Regulatory Affairs

would the (sic) defray any possible action on your part with respect to hampering WBS business. This payment would be made concurrently with the discussion between ourselves on the set off with respect to the migration costs. To date we have not received any feedback from your goodselves and the Authority's silence in this regard is affecting our planning going forward."

[19.4] the letter incorporated an undertaking to pay the sum of R4 million over the period 7 December 2012 to 31 March 2013;

[19.5] on 24 January 2013 Dr Mncube addressed Mtshali on a range of issues, recording, amongst others, the respondent's view that the applicant had not paid spectrum license fees since as long ago as the 2009/10 financial year and that the amount then owing by the applicant to the respondent was in the sum of approximately R60 million. Dr Mncube's letter concluded in the following terms:

"The payment arrangement of R1 million is therefore rejected as offered as a conditional acceptance of your letter. Therefore, WBS (the applicant) is advised to engage the authority on the payment settlement plan based on the full amount of +R60 million due."

[19.6] further communications ensued which culminated in another letter addressed by Mtshali to Dr Mncube on 4 April 2013. That letter sets out some of the history of the disputes between the parties. It was sent after the execution of the warrant that had been issued by Claassen J on 7 March 2013. In the letter, Mtshali emphasized the

fact that the applicant had repeatedly stressed to the respondent the urgency in resolving the outstanding issue relating to the fees payable *"... because we live with the constant threat that if we do not pay the outstanding license fees then we run the risk of having our service totally terminated or suspended."*[5]

[19.7] the following proposal was advanced by the applicant:

"In terms of a Settlement Plan, we hereby wish to further propose that the total fees will be settled over a Sixty months period where monthly WBS will pay R1.Million per month over such a duration proposed. Should the Authority wish for these fees to be settled over a shorter period, we are also willing to consider a 36 Months period whereby a total of R15Million will be paid annually.

Should there be any discrepancies and difference in calculation in favour of either party then such difference will be credited to the effected party."

[20] In his founding affidavit[6] Mtshali records that this letter was addressed by him after he had personally attended at the respondent's offices at approximately 16h00 on 3 April 2013 for the purposes of discussing the attachment and seizure of the applicant's property, but without success.

[21] In a supplementary founding affidavit delivered on 16 April 2013 in accordance with paragraph 4.2 of Vally J's order of 5 April 2013, Mtshali

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5 The first paragraph on the third page of that letter.
6 Paragraph 29, p.21 of the Bundle.

summarises the applicant's case in support of the relief sought in paragraph 1 of Part B of the notice of motion to be that, as he put it, *"the applicant's licenses had not expired"*. The case advanced in argument is that, although license fees are due by the applicant and, admittedly, have not been paid by it, the applicant's licenses remain effective until suspended and ultimately withdrawn in the terms contemplated in Regulation 12 of the Radio Frequency Spectrum Regulations, 2011 published in Government Gazette 34172 of 31 March 2011 which took effect on 1 April 2011 ("the RFS Regulations").

[22] The respondent's opposition to the relief sought in paragraph 1 of the notice of motion (Part B) is that the six licenses are no longer valid and had lapsed owing to the non-payment of the outstanding license fees. Furthermore, the respondent is not willing to accept the applicant's tender of payment in instalments.

[23] Regulation 9 of the RFS Regulations is in the following terms:

> *"9* ***Procedures in respect of renewals***
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> *(1) Renewal of a radio frequency spectrum license is performed on an annual basis by payment of the prescribed annual license fees, except in the case of multi-year licenses where the renewal is carried out upon completion of the multi-year license period.*

(2) The licensee must pay the renewal fee within forty (40) working days before the due date.

(3) If the annual radio frequency spectrum license fees are not paid by the due date then the radio frequency spectrum license will be deemed to have expired on the due date.

(4) An application for renewal of a license must be –

*(a) in the format as set out in **Form B of Annexure A**; and*

(b) accompanied by the applicable fee."

[24] **Due date**, in turn, is defined in Section 1 of the RFS Regulations to mean 31 December of each year.

[25] The applicant did not pay the required license fees for any of the years 2010, 2011 or 2012. On a reading of the afore-quoted Regulation 9, the applicant's licenses are deemed to have expired.

[26] Mr Budlender, who appeared for the applicant together with Mr Berger, submitted that the use of the word *"deemed"* in RFS Regulation 9(3) points to the conclusion that the respondent may, either expressly or by its conduct, choose to consider the licenses having expired. In other words, as I understood the argument, Regulation 9(3) affords the respondent the entitlement to make an election.

[27] In *S v Rosenthal*[7] Trollip JA said:

> *"The words 'shall be deemed' ('word geag', Afrikaans text) are a familiar and useful expression often used in in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction."*

[28] In my view, the words *"will be deemed"* as they appear in RFS Regulation 9(3) do not allow for the conclusion Mr Budlender seeks to draw therefrom. The words used lead to the inevitable conclusion that the regulation requires that licences which have not been timeously renewed by the appropriate payment are to be regarded as having expired with the consequential result that any continued operation of the network is not permitted.

[29] That conclusion, however, does not end the debate. The applicant also relies on RFS Regulation 12, the relevant portions of which read:

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7 1980 (1) SA 65 (A) at 75 *in fine*

*"12 **Procedures in respect of spectrum license withdrawal***

(1) The authority will proceed with the withdrawal of a radio frequency spectrum license as outlined in Section 31(7-10) of the Act.

...

(3) The Authority may suspend a radio frequency spectrum license and assignment for no more than twenty four (24) months, whereafter the license may be withdrawn, in any of the following circumstances:

...

(e) upon non-payment of the annual radio frequency spectrum license fees by the due date;"

[30] The applicant argues that there is a conflict between RFS Regulations 9 and 12. The former contemplates an automatic deemed lapsing of a license at midnight on 31 December of any year in the event that the license fees are not paid whereas the latter makes provision for the suspension of a license by the respondent (for no more than twenty four months) and the subsequent withdrawal of the license in the event that (as one of the possible grounds) the annual radio frequency spectrum license fees are not paid by 31 December of any given year.

[31] I am not persuaded that RFS Regulations 9 and 12 are in conflict with one another. An analysis of the two regulations must, of course, proceed from the rule of interpretation which promotes validity rather than invalidity – *"ut res magis baleat quam pereat".*[8]

[32] Regulation 9, in its terms, deals with the procedure required for a party such as the applicant to renew its radio frequency spectrum licences. In order to achieve that result the prescribed annual licence fees must be paid forty working days before 31 December of any given year. In the event that those fees are not paid, the licence will be deemed to have expired. That expiry, however, does not preclude the applicant for renewal of the licence from following the processes prescribed in Regulation 9(4) in submitting a late application for renewal. If approved, a late application will result in the renewal of the licence.

[33] Regulation 12, on the other hand, caters for a different set of circumstances. It governs the procedures necessary for the withdrawal by the respondent of spectrum licences. One of the entitlements afforded the respondent in terms of that regulation is to suspend a radio frequency spectrum licence for a period of not more than twenty four months (whereafter the licence may be withdrawn) should, for example, there have been a non-payment of the annual radio frequency spectrum licence fees by the due date. As an adjunct to the deeming provision contained in Regulation 9, the respondent may elect to "suspend" the licence for a period of twenty four months so as

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8 **Minister of Education and Training and Others v Ndlovu 1993 (1) SA 89 (A) at 91F; Cabinet for the Territory of South West Africa v Chikane and Another 1989 (1) SA 349 (A) at 371**

to preclude any renewal thereof in terms of Regulation 9. Thereafter, and again at the respondent's election, the licence may be withdrawn in which event, once again, it could not be the subject of a renewal in terms of Regulation 9.

[34] Although Regulations 9 and 12 are, when read together, somewhat clumsily constructed, that lack of elegance does not, in my view, lead to the conclusion that I can ignore the deeming provision contained in Regulation 9(4). The concepts of a "deemed expiry" and a "suspension" followed by a possible withdrawal self-evidently envision different sets of circumstances.

[35] The applicant did not pay the required licence fees. The result of that non-payment is that the applicant may not engage in the operation of the network as it is not in possession of radio frequency spectrum licences granted by the respondent as contemplated in Section 31 of the Electronic Communications Act. I conclude, accordingly, that, the declaratory relief sought in paragraph 1 of Part B of the notice of motion is not warranted. I will not grant an order in those terms.

[36] That brings me to the relief sought in paragraph 3 of Part B of the notice of motion – that which seeks the setting aside of the warrant issued by Claassen J on 7 March 2013. In short, the contention is that, at the time of the application by the respondent's inspector for the issue of the warrant, that inspector had already formed the view that the applicant was operating unlawfully. As a consequence, and as is contemplated in Section 17F(5)(d) of the ICASA Act, the identified non-compliance should have been referred

to ICASA's complaints and compliance committee rather than having led to an application for the issue of a warrant.

[37] Section 17G(4)(b) of the ICASA Act directs that a Magistrate or Judge must issue a warrant if it appears to him or her, from information on oath or affirmation, that there are reasonable grounds for believing that a document or thing which has a bearing on the alleged non-compliance or other act referred to in Section 17F –

"(i) is or will be in the possession or under the control of any person or on or in any premises within the area of jurisdiction of that Magistrate or Judge; and

(ii) cannot reasonably be obtained otherwise."

[38] It is a requirement of Section 17G(5)(a) that the warrant contemplated in sub-section (4) must, amongst others, specify which of the acts contemplated in sub-section (2)(a) to (g) may be performed thereunder by the inspector to whom it is issued. The warrant issued by Claassen J does so.

[39] I am not persuaded that the limitations which the applicant seeks to impose on the provisions of Section 17F are appropriate. Although, for example, Section 17F(d) directs an inspector to refer all non-compliance matters to the respondent's complaints and compliance committee, that requirement does not preclude the inspector from approaching a Magistrate or Judge for a warrant on the basis that there are reasonable grounds for believing that

the document or thing referred to in the appropriate sub-section has a bearing on the alleged non-compliance or other act referred to in Section 17F. The ambit of Section 17G(iv) is sufficiently wide to permit the issue of a warrant even in circumstances in which an inspector is required in terms of Section 17F(5)(d) or (e), to refer non-compliance matters or complaints to the complaints and compliance committee.

[40] Section 33 of the Electronic Communications Act proscribes possession of any radio apparatus by any person unless that person is in possession of a radio frequency spectrum license. Given the conclusions to which I have come, the applicant is not in possession of such a radio frequency spectrum license and, for that reason, is not entitled to possess any radio apparatus.

[41] Section 32(3)(b) of the Electronic Communications Act authorises the authority (the respondent) to seize such apparatus for disposal as contemplated in terms of sub-section (4). Section 32(4), in turn, directs that apparatus seized by the respondent must be held by it, at the cost of the applicant, until:

[41.1] its possession is authorised in terms of Section 31; or

[41.2] the matter is dealt with by a court of law.

[42] Section 17(G)(5)(b) directs that a warrant issued in terms of that section is valid until, amongst others, it is either executed or the purpose for which the warrant was issued no longer exists.

[43] The warrant has been executed. That execution took place on 3 April 2013. Thereafter, Vally J directed that the goods attached pursuant to that execution be returned to the applicant. In my view the order that I intend making will not automatically revive the warrant or the respondent's entitlement to be in possession of the attached goods - nor does the interim order issued by Vally J on 5 April 2013 make provision therefor. As Mr Kennedy cogently argued, the warrant has expired and its prior existence is, in the current circumstances, rendered moot.

[44] In the circumstances I am not satisfied that the warrant issued by Claassen J on 7 March 2013 was not validly issued in terms of Section 17G(4) of the ICASA Act nor am I persuaded that any basis exists for now setting it aside – effectively an exercise in futility. In the result the relief sought in paragraph 3 of Part B of the notice of motion must fail.

[45] The conclusion to which I have come is that the applicant is not entitled to the relief formulated in the notice of motion. At the hearing of the application, and by agreement between counsel, in reserving my judgment on the merits I granted an order extending the interim order made by Vally J on 5 April 2013 to a date five days after the delivery of this judgment.

[46] In the result I make the following order:

"1. The application is dismissed.

2. The applicant is to pay the costs of the application which costs are to include those reserved for determination by Vally J on 5 April 2013.

3. Paragraph 2 of the order of Vally J dated 5 April 2013 remains binding for a period of five days from the date of this order, the first day of that period being the date of this order."

A R G MUNDELL, AJ
ACTING JUDGE OF THE HIGH COURT
22 APRIL 2014.