



## **COMPLAINTS AND COMPLIANCE COMMITTEE**

**DATE OF HEARING: 23/06/2023**

**CASE NO: 453/2023**

**LICENSING AND COMPLIANCE DIVISION**

**COMPLAINANT**

**V**

**SIYAYA FREE TO AIR TV (PTY) LTD**

**RESPONDENT**

**CCC MEMBERS:**

Judge Thokozile Masipa – Chairperson  
Councillor Catherine Mushi - Member  
Mr Monde Mbanga - Member  
Mr Peter Hlapolosa - Member  
Mr Thato Mahapa - Member  
Mr Paris Mashile – Member  
Ms Ngwako Molewa - Member

**FROM THE OFFICE OF THE CCC:**

Lindisa Mabulu - CCC Coordinator  
Meera Lalla - CCC Assessor  
Thamsanqa Mtolo - CCC Assessor  
Amukelani Vukeya – CCC Administrator

**LEGAL REPRESENTATION FOR PARTIES**

**For the Complainant** - Busisiwe Mashigo and Kabelo Thelele

**For the Respondent** - Jack Phalane (Attorney), Zach Thalla & Kelebogile Mthembu

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## JUDGMENT

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Judge Thokozile Masipa

### INTRODUCTION

- [1] On 24 March 2023, the Licensing and Compliance Division of ICASA (“the Complainant”), lodged a complaint against the Respondent for investigation in terms of section 17B(a)(i) of the ICASA Act No. 13 of 2000 (“the Act.”) An amended complaint was received on 5 April 2023.
- [2] It was alleged that the Respondent contravened Regulation 5(1) of Schedule 1 of the Standard Terms and Conditions for Individual Electronic Communications Services Regulations of 2010 as amended.

### THE PARTIES

- [3] The Complainant is the Licensing and Compliance Division of ICASA. It shall be referred to as the Complainant.

The Respondent is Siyaya TV (Pty) Ltd (“Siyaya”/ “The Respondent”).

### BACKGROUND

- [4] On 21 January 2015, ICASA issued a Commercial Subscription Television Broadcasting Service Licence to Siyaya TV. Eight years later, the Respondent has, allegedly, failed to commence operations.

### THE COMPLAINT

#### *The allegation*

- [5] The Respondent is alleged to have contravened Regulation 5(1) of Schedule 1 of the Standard Terms and Conditions for Individual Electronic Communications Services Regulations of 2010, as amended.

### **The Law**

- [6] Regulation 5(1)(c) states that:

*"A licensee must commence operation of the Broadcasting Service specified in the Licence, within the period mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:*

*(c) twenty-four (24) months from the date of issue in respect of subscription Broadcasting Service".*

### **THE RESPONDENT'S RESPONSE**

- [7] The Respondent's response was an inelegantly phrased two-pronged defence.
- [8] Firstly, Siyaya gave an impression that it was admitting and not denying the non-compliance, as it set out reasons for its failure to comply.
- [9] Secondly, and in the same breath, it denied the non-compliance, stating that in fact it had complied with the Regulation allegedly contravened.
- [10] Thirdly, the alleged compliance was qualified by the phrase *"to the extent allowed by the current broadcasting environment"*.
- [11] To enable the CCC to accurately deal with the nub of the matter, it became necessary to rephrase the defence.
- [12] In essence, the defence raised should have been first phrased as a denial since the Respondent was of the view that it had complied, albeit partially. In the alternative, it should have been pleaded to the effect that in the event

the CCC made a finding of non-compliance, then the Respondent had reasons which it duly set out.

## **THE DENIAL**

[13] Siyaya denied that it had contravened the Regulation. It insisted that it was up and running and that this has been the case for a number of years.

## **THE ADMISSION**

[14] At the same time, Siyaya admitted that it had not complied with Regulation 5(1) and raised a number of defences for its non-compliance.

[15] The details of this defence are to be found in a letter, by Siyaya dated 26 April 2019, which have been summarised hereunder:

15.1 There was a delay, by the Authority, in the award of the licence from the date of issue of the invitation to apply (ITA) (11 July 2012), to the issuance of the licence in 2015. According to the Respondent, this was one of the reasons for its inability to execute the business plan as per its application;

15.2 The extremely slow rollout of Digital Terrestrial Television (DTT) also played a role and exacerbated Siyaya's problems. As such, the government in general, ICASA and the Department of Communications and Digital Technologies (DCDT), in particular, should take accountability for the failure of implementation;

[16] Meanwhile, the broadcasting environment underwent significant transformation which made it more and more difficult to commence operations.

[17] And lastly, Siyaya stated that the commercial subscription broadcasting sector is not viable.

[18] Siyaya added that the above challenges prompted it to seek a solution. So, in an effort to mitigate the effects of non-compliance, it embarked on an alternate business plan that includes licensing agreements for the provision of content and channels.

### **Historical developments in the broadcasting industry as set out by Siyaya**

[19] The letter above, setting out the defence, is addressed to the CCC Assessor, and signed by the Respondent's CEO, Aubrey Tau. It outlines historical developments in the broadcasting sector since 2012, when the Licensee applied for a licence to date. For the sake of completeness and accuracy, the submissions concerned are set out *verbatim* hereunder:

[20] MultiChoice claimed it had approximately five (5) million subscribers in the whole of Africa in July 2012 against the 6.7 million subscribers (in South Africa only) it reported in 2015.

[21] Concurrently, over the same period, DSTV's only competition, then Top TV's subscription base, was reduced by half from 400 000 subscribers to 200 000 subscribers;

[22] Openview, a free to air digital satellite television service, was launched in 2013, and had acquired 1.1 million subscribers by 2015;

[23] Unemployment increased to 25.1% and the *per capita* income in South Africa declined by 0,2% as per the World Bank.

[24] In conclusion, Siyaya blamed the Authority and the government for its inability to comply.

### **THE ROLE PLAYED BY SIYAYA**

[25] While Siyaya insisted that the problems that beset it were beyond its control it transpired that Siyaya voluntarily chose to remain a mere spectator where it could have done something to ameliorate the situation.

[26] An analysis, therefore, of not only what Siyaya did, but also what it did not do that could have contributed to its problems was found to be useful. Such analysis appears later in this judgment under the issue of ITAs.

### **THE ALTERNATIVE PLAN**

[27] One interesting feature about this matter was the claim by Siyaya that it took steps to embark on an alternative plan and had in fact commenced operations.

[28] The Respondent stated that it had commenced operations to the degree the television broadcasting environment in South Africa allowed it to.

[29] The claim by Siyaya that the Respondent has commenced operations is misplaced as will be seen when this aspect is examined fully in due course.

[30] Although the charge is simple and straightforward, because of the unusual nature of the submissions, it became necessary to hear the matter piece meal, on more than one occasion.

### **THE FIRST HEARING**

[31] The hearing in this matter was scheduled for the 23rd June 2023. During the course of the proceedings, the parties expressed a desire to meet and discuss the issues, with a view to finding a solution and possibly submitting a settlement proposal.

[32] The matter was then postponed to enable the parties to try to resolve the issues by presenting the CCC with a settlement proposal for its approval.

[33] Following discussions, the parties agreed on a settlement proposal which they presented to the CCC.

[34] Having examined it, the CCC was of the view that the proposal did not fully deal with the relevant issues. To assist the parties, the CCC prepared a

number of questions and requested the parties to work on further submissions along specific lines. The CCC would like to express its gratitude to the parties for their assistance.

## THE SECOND HEARING

[35] At the second hearing, Siyaya elaborated on its submission that it had "*commenced with operations*". Various steps taken by Siyaya over time, were set out in detail.

[36] Our priority, therefore, as the CCC, was to examine Siyaya's claims of compliance against the provisions of the Regulation.

## THE LEGAL FRAMEWORK

[37] There is nothing complicated about the legal framework and the applicable provision.

[38] The Respondent is alleged to have contravened Regulation 5(1) of Schedule 1 of the Standard Terms and Conditions for Individual Electronic Communications Services Regulations of 2010, as amended.

[39] Regulation 5(1)(c) states:

*"A licensee **must** commence operation of the **Broadcasting Service specified in the Licence, within the period mentioned** in the paragraphs below, **unless the Authority grants, on good cause shown, an extended commencement period:***

*(c) twenty four (24) months from the date of issue in respect of subscription Broadcasting Service."* (my emphasis).

[40] A licensee is obliged to commence operation of not just any service, but the ***Broadcasting Service specified in the Licence***. The peremptory nature of the provision is to be found in the word "***must***". This means that the Licensee

has no choice in the matter. It either commences operations of the Broadcasting Service as specified, or applies for an extension. If it fails to do one of these, it falls foul of the law.

- [41] There must have been a reason why the Legislature deemed it necessary to specify the Broadcasting Service concerned. In my view, it was to ensure that there would be no confusion or uncertainty in this regard.
- [42] Since the broadcasting service is easily identifiable, there can be no room for error or a misunderstanding. Any service, therefore, or any Broadcasting Service, other than that which is specified in the Licence, does not qualify in terms of the Regulation concerned.
- [43] A Licensee claiming to have complied with Regulation 5(1) would have to show, first, that the service it provides is a broadcasting service. Moreover, it has to prove that the Broadcasting Service in operation, is the one specified in the Licence. Failure to do so would mean there has been non-compliance with the Regulation.
- [44] The provision also empowers the Authority to grant an extension of the commencement period to Licensees who qualify. So, while it is imperative that the Licensee commences operating in accordance with the law, the Legislature has made allowances for delays, in deserving cases, where the Licensee is not able to commence operations at the designated date.
- [45] It is important to note that only the Authority has the power to grant the extended period and, only ***on good cause shown***. A licensee can neither abridge nor extend the period within which to commence operations. To do so would be to usurp the functions of the Authority.
- [46] In the present case Siyaya, as a Licensee, neither qualifies nor is equipped to adjust the period within which to commence operations. That is the prerogative of the Authority.



- [47] The time granted to the Authority within which to exercise this function is also fixed. In terms of the Regulation, the Authority has been empowered by legislation to grant an extended commencement period, twenty-four (24) months from the date of issue of the licence.
- [48] However, the Authority cannot do this *mero motu* as the process has to be initiated by the Licensee who has to submit a request in writing, stating good reasons (good cause) for the request concerned.
- [49] This presupposes that the Authority will evaluate the merits of the request before making a decision to grant or decline the request concerned.
- [50] Whether the reasons submitted at this hearing would have qualified as “good cause”, is a matter that would have been determined by the Authority, at the time of the written request by the Licensee.
- [51] However, there is no evidence that Siyaya made a request for an extended commencement period. This failure by Siyaya to take advantage of the provision above remained unexplained.
- [52] It is quite possible that Siyaya did not know that legally it could request an extension. But that would be speculating - an exercise that can assist neither the Licensee in its defence, nor the CCC in reaching a decision.
- [53] Counsel for the Respondent sought to argue that the slow pace at which the complaint was processed before it was referred to the CCC was prejudicial to its case. If the complaint had been brought to the CCC earlier, Siyaya would have been in a position to correct the situation by requesting the extension, it was argued.
- [54] This submission cannot be correct as it loses sight of the purpose of the provision. It seems to me that regulation 5(1)(c) was intended to assist a Licensee who, for good reason, was unable to commence operations within the designated period, by granting it an opportunity to deal with whatever was impeding its ability to commence operations. This extension would,

among other things, grant the Licensee an opportunity to correct or remove anything responsible for the delay in commencing operations.

[55] The granting of the extension is not automatic. It can only come into effect when there is an application for it by the Licensee. Moreover, it can only be granted by the Authority where good cause is shown to exist. The purpose of the provision is to assist Licensees in this regard, and certainly not to prevent complaints from being brought before the CCC.

[56] As a Licensee, Siyaya cannot be heard to say that it did not know the law. It certainly seems, to the CCC, that Siyaya was not cognisant of the legal boundaries within which it was permitted to operate. That, however, is no excuse as Siyaya had a duty to familiarise itself with the laws and regulations that govern the industry in which it chose to operate.

### ***Commencing Operations:***

#### ***What does it entail?***

[57] What exactly is meant by commencing operations? While the answer may be obvious when one examines the relevant legislation, the meaning seemed to elude the parties as they spent some time debating this point.

[58] The Respondent insisted that, in its view, it was operational. Surprisingly, this view was, initially, not seriously opposed by the Complainant. I say this because, during submissions, on behalf of the Complainant, it was stated, more than once, that Siyaya was "*not fully operational.*" This suggested that the Complainant was in agreement with the assertion that there was partial compliance by the Respondent.

[59] The submission that Siyaya is partially compliant, without closely examining what the regulation provides, and what exactly the Respondent is doing, would have been flawed, in my view.

## ***The Anatomy of Siyaya TV as a service provider***

[60] Counsel for the Complainant submitted that the statement that Siyaya was not fully operational meant that as a broadcaster, it didn't own or transmit its own signal. It didn't have its own audience or own subscribers. In addition, as a content provider, it was currently being carried on another platform, MultiChoice, which is itself, a licensee.

[61] While the Complainant's view was that Siyaya was no more than a content provider to MultiChoice, Siyaya saw itself differently. To this end, I quote from Mr Zach Thalla's submissions:

*"We see ourselves as proper industry player in the context of being able to broadcast our channels. So I think defining us as a content provider is... it is too narrow. Where the challenge arises it is through the transmission and then the transmission of the network..."*

[62] Elaborating on the relationship between Siyaya and MultiChoice, Mr Zach Thalla stated that Siyaya's service has been available in MultiChoice since February 14, 2018. Siyaya currently broadcasts on two channels, namely MojaLove, and Moja99.

[63] According to Siyaya, in terms of content, editorially, it is independent. This means it decides what content is to be broadcast. In terms of the actual *"technical packaging of the channel"* it does that itself through a private provider. In addition, it determines the scheduling *"autonomously independently of MultiChoice."*

Siyaya also delivers its signal to MultiChoice through tele-medium ICS licensee.

[64] Mr Thalla concluded:

*"So, in effect, what happens is, up to the point that the channel is complete, MultiChoice has nothing to do with it. They basically upload it to their satellite and that is it."*

## DISCUSSION

- [65] Siyaya was of the view that what it was doing was one way of dealing with the challenges that stand in the way of its progress as a broadcaster. The difficulty with this approach, however, is that it is far from being a solution.
- [66] What causes more unease, is that Siyaya, by its conduct, removed itself from the regulatory system and is currently operating outside the law. I say this because ICASA monitors the conduct of Licensees in the broadcasting industry. Content providers fall outside the ICASA Act and the underlying statutes.
- [67] It goes without saying that a Licensee cannot (for lack of a better word), regulate itself. It is the prerogative of the Authority to regulate the broadcasting industry in the public interest. It is not up to an individual Licensee to try to find a solution to industry problems or shortcomings.
- [68] In the present case, Siyaya ignored legislation that regulates it as a Licensee, and embarked on what it referred to as an alternative plan. Such initiative had nothing to do with what it had been licensed to do, which was to operate a commercial subscription broadcasting service.
- [69] It bears repeating that what Siyaya is doing, is not only, not in alignment with its licence terms and conditions, but would also, if allowed, set an undesirable precedent that would encourage Licensees to do as they pleased. The licence that was issued to Siyaya was for a specific purpose, that is, a commercial subscription television broadcasting licence, and not for any other.
- [70] To be defined as a commercial subscription television broadcasting service a Licensee must have certain key features. Among these are, namely:—
- 70.1 Commercial: This means the service must be done on a pay **per** view basis.

70.2 Subscription: This means having subscribers who are paying for the particular broadcasting service.

[71] In the present case, there is no pay *per* view basis. In addition, Siyaya doesn't receive direct payment from the subscribers or viewers. The fee is received indirectly and paid to Siyaya in relation to the two channels. And that cannot qualify Siyaya as a commercial subscription broadcaster.

[72] With no own network and own subscribers, among others, it is clear that Siyaya is not operating the broadcasting service specified in the Licence. This means it is not complying with the Regulation.

***What about the term "partially or partly operational?"***

[73] Neither of these terms feature in the legislation. And none can act as a proper defence. It's either a Licensee complies with the Regulation or does not. There are no half measures.

[74] More concerning, however, is that the term "*partly compliant*" has the unfortunate effect of trivialising the seriousness of Siyaya's failure to comply. This is possibly an indication that Siyaya lacks insight into the gravity of its actions. If that is so, it might be a matter of time before Siyaya finds itself in exactly the same situation.

[75] The fact that Siyaya TV is active and provides content to consumers and has been doing so since 2018, is no proof of compliance.

[76] On the contrary, it is an indication of an Achilles heel in our regulatory system. [I interpose to state that this is an aspect that can and shall properly be dealt with by way of recommendations to ICASA].

[77] It is also important, at this stage, to examine the role played, if any, by the monitoring division of ICASA. This will serve to verify whether the claims by Siyaya that it was prejudiced because ICASA failed to draw its attention to

how it could remedy the non-compliance during the early stages, have any substance.

### ***Engagement of the Authority with Siyaya TV***

[78] Kabelo Thelele, the Compliance Officer responsible for Siyaya TV, took the CCC back to July 2020, when the Authority had its first engagement with Siyaya concerning its non-compliance. On that occasion, the Authority wrote a letter to Siyaya, in which it explained in detail, that according to its records, Siyaya had not commenced operations.

[79] What followed was a series of meetings between the parties. At the end of those meetings, however, no solution was found as Siyaya insisted that it was compliant. It was this insistence that eventually triggered a referral of the matter to the CCC.

[80] The fact that Siyaya is providing content to MultiChoice for the purposes of using it as a platform, is of no moment as it is not even remotely related to the service it was licensed to provide. What the Respondent is doing, may have a semblance of compliance, but it certainly falls outside the scope of broadcasting.

[81] It has to be emphasised that the licence that was issued to Siyaya is a commercial subscription television broadcasting licence. This means it can be used for one purpose only and that is the purpose for which the licence was issued. It can never be modified or altered, outside the empowering statute.

[82] The approach by Siyaya, in seeking and implementing an alternative plan outside the legal framework, may have been well meaning but it was certainly misguided. It is tantamount to taking the law into one's own hands, which creates a dangerous precedent. That, in itself, may act as an aggravating factor.

[83] ICASA is the only authority specifically empowered to regulate the broadcasting industry in the public interest. In a case, such as the present,

where a Licensee is unable to commence operations, within the specified period, the law ensures that the Licensee concerned does not suffer any prejudice, but is given a further opportunity within which to commence its operations.

[84] This simple solution to Siyaya's dilemma is to be found in the very provision that Siyaya has contravened. This is why it is difficult to understand how Siyaya missed this and neglected to take advantage of it, when it was informed that it was not compliant.

[85] Of course Siyaya continued, unabated, to lay the blame on ICASA for its woes. It is clear from the foregoing discussion that the submission pointing fingers at ICASA, has no basis. Numerous interactions between the parties concerning this matter, attest to the fact that ICASA did try to assist Siyaya but to no avail.

[86] The CCC also noted, with displeasure, the failure by Siyaya to take responsibility for its actions and viewed such failure in a serious light. Failure to take responsibility for one's actions is an aggravating factor.

[87] Even following numerous attempts by ICASA to assist Siyaya, the latter ignored the assistance and chose to go its own route. Choosing to seek an alternative approach, instead of requesting an extended period of commencement by Siyaya, was its undoing.

[88] The facts are clear. And so is the law. Siyaya TV has not commenced operations in terms of its licence terms and conditions and is, therefore, in contravention of Regulation 5(1) as charged.

## **CONCLUSION**

[89] The service that Siyaya has been providing and continues to provide, is not in the least related to a commercial subscription television broadcasting service.

[90] Throughout the proceedings, Siyaya was adamant that there was a series of defences over which it had no control.

[91] In its submissions, Siyaya gave an impression, *inter alia*, that it became a victim of circumstances when, for unknown reasons, the process in the ITA issued in July was unexpectedly halted. It transpired later that Siyaya omitted to share the full picture of events leading to the current situation.

### **REASONS ADVANCED BY SIYAYA FOR ITS FAILURE TO COMMENCE OPERATIONS**

[92] In summary, the Respondent advanced two main reasons namely:—

(a) The delay in the issuing of the licence to Siyaya;

(b) The delay or absence of a spectrum.

#### ***The Delay In The Issuing Of The Licence***

[93] According to Siyaya TV, the 3-year delay by the Authority to issue the licence is partly to blame for its inability to commence operations.

[94] On behalf of the Respondent, a submission was made that, during this three-year period, historical developments changed the broadcasting landscape to the extent that the industry was no longer viable. It was alleged that these developments made it difficult for Siyaya to commence operations in accordance with the terms and conditions of its licence.

[95] No submission was made on behalf of the Complainant in this regard. As a result, it was impossible to assess the impact of such developments on Siyaya's ability to commence operations, if any.



- [96] While the delay in the issuing of the licence may have been beyond the control of Siyaya, the issue of the spectrum licence was well within the control of Siyaya but it failed to do anything about it.
- [97] A team of experts from Policy, Research and Analysis assisted the CCC by placing the issue of the ITA in perspective. While Siyaya had given the impression that after it had been pre-qualified, the process of the ITA issued in July 2012, came to a sudden unexplained halt, it transpired that Siyaya failed to bid, thereby prematurely removing itself from the process.
- [98] The CCC is grateful to Owen Mhlanga, senior manager market regulation: Policy Research and Analysis, Davis Moshuenyane, Broadcasting Frequency Coordination Licensing, Seabelo Molefe, Regulatory Economic Specialist: Policy Research and Analysis, and Ruvengano Mandebvu, manager: Cost Modelling: Policy Research and Analysis for the assistance in this regard.
- [99] What became clear was that while Siyaya was blaming third parties for its failure to comply, there was ample evidence that its inaction, where it could have clearly taken action, contributed to the problems that it was now facing.

### **THE ISSUE OF THE ITA**

- [100] The Authority's records show that ICASA issued three ITAs within a short space of time. In respect of the first ITA, during July 2012, Siyaya was one of the three interested parties that applied. It was successful and reached the pre-qualification stage in the first phase of the process. However, after the pre-qualification phase, Siyaya failed to bid or pursue the matter further.
- [101] Having failed to complete the process in the first ITA, one would have expected Siyaya to take advantage of an opportunity that presented itself later when ICASA issued another ITA. On this occasion Siyaya did not apply. Again, no reasons were given for its failure to do so.
- [102] Then there was a third occasion when ICASA issued another ITA. Once more, Siyaya failed to respond or show any interest.

[103] The reason Siyaya had no spectrum licence was because it failed to apply for it each time ICASA issued an ITA. It is clear, therefore, that Siyaya has no one to blame but itself.

### **AGGRAVATING AND MITIGATING FACTORS**

[104] The role played by the analysis of aggravating and mitigating circumstances, in reaching a just sanction, can never be overemphasised.

[105] The recognition of such a role is crucial, especially in a case such as the present, where the sanction is likely to be heavy.

[106] In considering aggravating and mitigating factors the CCC had to look at other equally significant factors such as the relevant legislation.

[107] The Legislature, well aware that there may be instances where a Licensee, sometimes through no fault on its part, may fail to commence operations timeously, deemed it fit to make provision for contingencies such as the one faced by Siyaya.

[108] Regulation 5(1)(c) ensures that the Licensee has a second chance before the Regulator shuts its doors on it, should the time designated for commencing operations turn out to be inadequate.

[109] This means that the Licensee has an opportunity to request an extended commencement period that is, a period of twenty-four months from the date of issue of the licence. On good cause shown, the Authority may grant the Licensee such extended period.

[110] Siyaya failed to take advantage of this provision but instead focused on irrelevant issues. For example, it bemoaned the fact that because of the extraordinary delay, before the matter was referred the CCC for adjudication, it was now prejudiced as it was unable to apply for the extended period as set out in the regulation above. As said earlier, nothing could be further from the truth.

[111] From the facts it is clear that the Authority did all it could to engage and assist Siyaya TV, to no avail. In fact, the Authority may have gone overboard in trying to lend a helping hand to Siyaya.

[112] It appears that Siyaya was given the proverbial long rope to hang itself and, unsurprisingly, it did just that.

[113] The above observation does not let the Respondent off the hook or exonerate it in any way. Siyaya applied for a licence to operate in the broadcasting industry but chose to do something different. It was duty bound to familiarise itself with various laws and regulations that apply to it in the said industry and conduct itself accordingly. The fact that it failed to do so, cannot be the fault of the Authority.

[114] However, that does not mean the unduly long period in which Siyaya was allowed to remain non-compliant should be ignored. It is a matter of concern. This case took almost 6 years before it was referred to the CCC for adjudication - a good example of the wheels of justice (regulatory system in this case) turning ever so slowly.

## **THE DELAY OR ABSENCE OF A SPECTRUM**

[115] Siyaya failed in its submissions to mention that it did not respond when three ITAs were issued by the Authority. Instead, it gave an impression that the process in the first ITA that was issued in July 2012 fizzled out and came to a sudden and unexplained halt. Details in this regard have been discussed elsewhere in this judgment. It would serve no purpose to repeat them here.

[116] More aggravating factors and mitigating factors shall be dealt with in detail below when discussing the submissions by Siyaya relating to its mitigating factors.

## **FINDING**

[117] Accordingly, the CCC makes the following finding:

117.1 Siyaya failed to comply with Regulation 5(1) of Schedule 1 of the Standard Terms and Conditions for Individual Broadcasting Communications Services Regulation of 2020, as amended in that it failed to commence operations of the Broadcasting Service specified in the Licence within the specified period.

## **WRITTEN SUBMISSIONS BY SIYAYA IN RESPECT OF THE POSSIBLE SANCTION**

[118] At the request of the CCC, Siyaya submitted written submissions on why Siyaya's licence should not be revoked in the event that it was found to have contravened the Regulation as charged.

[119] Siyaya, *inter alia*, made an impassioned plea that the CCC refrain from recommending the revocation of its licence as a sanction. In this regard, it relied on the CCC judgment in the matter of E-Sat TV, as a precedent.

[120] On behalf of Siyaya, it was argued that the facts in the matter of E-Sat TV were similar to the facts in the present matter. In that matter, the charge was that E-Sat TV had failed to commence operations within the specified timeframe. There the parties were given an opportunity to submit a settlement proposal which was subsequently made an Order of the CCC.

[121] Siyaya's submissions were to the effect that it would not be fair if Siyaya were to be treated differently when it came to the sanction.

[122] Siyaya, correctly, emphasised the importance of consistency in the application of the law, "*to ensure legal certainty and equality before the law.*"

[123] Precedents are not meant to be applied blindly. They have a place and purpose. Siyaya's argument overlooked the importance of treating each case on its own merits and avoiding the blind application of a one-size-fits-all solution.

[124] Merits of a case include more than just the bare facts of the matter. More importantly, merits include the evidence as well as circumstances, nuances that give rise to the uniqueness of a case.

[125] Also included in the merits, is the manner in which the case was conducted by the Respondent. It follows, therefore, that no two cases can ever be exactly the same.

[126] It is so, that the complaint that formed the subject matter in E-Sat is similar to the one in the present matter. In my view, however, that is where the similarities end.

[128] The Siyaya matter is clearly distinguishable from the E-Sat matter in a number of respects:

[129] In E-Sat, though the matter took a number of years before it was referred to the CCC, the Respondent certainly did not take the law into its own hands. It recognised ICASA's responsibility to regulate the industry and did not insist that it was compliant when the non-compliance was brought to its attention. It settled on the basis that it was non-compliant. And the settlement agreement was accepted by the CCC.

[130] In the Siyaya matter, the CCC did not endorse the settlement proposal between the parties as the proposal was found wanting in important aspects. The CCC then gave Siyaya another opportunity to make further submissions to help resolve the matter.

[131] In the Siyaya matter the Respondent displayed little interest in completing the process after it had prequalified. Thereafter, it showed no interest at all by failing to respond to later invitations when ICASA issued the second and the third ITAs.

[132] Siyaya exacerbated its own problems by embarking on what it referred to as an alternative approach. This is did without consulting ICASA.

[133] E-Sat neither insisted that it was compliant nor did it seek an alternative solution outside the legal framework. It simply failed to comply.

[134] One striking feature that distinguishes Siyaya from E-Sat is that Siyaya seems to lack insight into the gravity of the charge and refused to accept responsibility for its actions.

[135] Another interesting feature is that Siyaya invested a large amount of time and money to embark on its alternative route, a course of action not envisaged by the Act. It was argued on behalf of Siyaya that it was prejudiced financially.

[136] This submission is without basis as the money spent benefited Siyaya. Moreover, it was money spent on the wrong thing by Siyaya, on its own accord. Such expenditure, therefore, cannot be referred to as a loss suffered by the Respondent.

[137] What weighed heavily with the CCC is that Siyaya carried on, seemingly oblivious to the consequences of its actions.

[138] But what really sealed the fate of Siyaya is to be found in its belief and statement that the commercial subscription television service is not viable. If the service is not viable, there would be no desire to pursue it.

[139] This probably explains the nonchalant nature in which Siyaya conducted its case. If Siyaya sees the commercial subscription television service as not viable, then it would make little sense to allow Siyaya to hold on to a licence that is of no use to it.

## **ORDER**

[140] Having said the above, it would be a sad day if the CCC were to overlook the importance of a balancing exercise, no matter how difficult the tightrope might be. In the present case, the tightrope is indeed difficult but it must be walked. I say this because as serious as the aggravating factors are, there is

one mitigating factor that needs to be factored in to ensure that justice is done. It is this: Siyaya is a first offender, and this must count for something.

[141] Traditionally, in the law courts, first offenders are treated less harshly compared to repeat offenders. There seems to be no reason for this tribunal to act differently when dealing with a first offender.

[142] Lending credence to this view, is the fact that in terms of the empowering statute, the revocation of a licence is reserved for repeat offenders. Siyaya is not a repeat offender. In fact it has not even started its journey as a broadcaster.

[143] It seems to me that the reason the Legislature specifically reserved the revocation of a licence for repeat offenders, was to allow new entrants in the industry an opportunity to learn and grow and ultimately become serious role players as that would be in the public interest. In my view, kicking out a new entrant, without offering it a second chance to correct its faults, would not be in the public interest, especially in a monopolistic environment where new comers should be welcome and assisted where possible.

#### ORDER

[144] Accordingly, the CCC recommends to the Authority

144.1 to direct Siyaya to desist from further contravention;

144.2 to direct Siyaya to approach the Authority, within 21 days of the issue of this decision, with a detailed concrete plan as to how it intends to remedy the situation. The plan must be implemented within 12 months of approval by the Authority. Failure to do so will be non compliance of the Order which shall entitle the CCC to act in accordance with section 17H(3)(d) of the Act.

#### **RECOMMENDATIONS TO ICASA**

[145] In terms of section 17 (B)(b) of the ICASA Act No 13 of 2000 as amended, the CCC makes the recommendations hereunder:

145.1 That the Authority seriously considers reviewing its monitoring procedures, policies and the legislation where necessary, to improve the effectiveness of its monitoring processes and the speed in which complaints are processed.

145.2 Among other things, constant revision and regular upgrading of high quality regulation is crucial not only for the stability of the industry concerned, but also for the protection of the country's economy. Rapid changes in markets make the need for regulation even more pressing especially in a sector as complex and dynamic as broadcasting.

[146] It is recommended that the Authority keep in mind the importance of acting promptly and swiftly when dealing with matters of non-compliance. Among other things, prompt action on the part of the Authority, would serve to discourage offenders from flouting the law with impunity.

*TMMasipa*

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**Judge Thokozile Masipa**  
**Chairperson of the CCC**

**Date: 24 July 2024**