COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 16 September 2016 **CASE NUMBER 207 /2016**

IN RE: AGANANG FM

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

From Aganang FM: Mr Thabo Leping (Station Manager)
From Broadcasting Compliance: Ms Fikile Hlongwane (Manager)
Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] Aganang FM is a community broadcaster in terms of the Electronic Communications Act 2005 ("ECA"). It broadcasts in Setswana , English, Afrikaans

[1] An 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.

and Sesotho within a radius of 100 kilometres (in the areas of Klerksdorp, Orkney and Ventersdorp) and has, in the range of, 94 000 listeners.

The station was referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA since it had, allegedly in conflict with regulation 4(13) of the *Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters in Respect of Municipal Elections Broadcasting* (as amended), broadcast ten Party Election Broadcasts ("PEB") from the 17th July to the 21st July 2016, each of which exceeded the time limit of one minute by between 40 and 50 seconds. A PEB is defined as follows in section 1 of the Electronic Communications Act 2005("ECA"):

"party election broadcast" means a direct address or message broadcast free of charge on a broadcasting service and which is intended or calculated to advance the interests of any particular political party;

[2] In terms of section 56 of the ECA a PEB may only be broadcast during an election period. An "election period" is defined by the ECA as "the period commencing with the date on which the election is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected." PEB's may, however, in accordance with section 57 of the ECA, only be broadcast from the day on which an election is proclaimed up to 48 hours prior to the polling period commences – which, in this case, was at 07:00 on the 3rd of August 2016. The election on 3 August 2016 was proclaimed in the *Government Gazette* by the Minister of Cooperative Governance and Traditional Affairs, Mr D van Rooyen, on 23 May 2016 after he had signed the notice on 22 May 2016 in terms of the Local Government: Municipal Structures Act 1998.

[3] There was no contravention of section 56 read with section 58. The question is, however, whether the above mentioned regulation 4(13) had been contravened negligently or intentionally.

[4] After having been informed of the alleged contraventions by the Broadcasting Compliance Unit at ICASA, the manager of *Aganang FM* acknowledged that a contravention had taken place. He, however, stated that both he and the staff had not paid attention to the length of the PEB's and had

accepted that they complied with the time limit of 60 seconds. Only when he was informed by Broadcasting Compliance at ICASA that the time limit had been breached, he became aware of the contravention. There was, accordingly, no intentional breach of the said regulation.

[5]The ultimate question is, however, whether there was negligence on the side of the radio station. This is so since, even if there had objectively been a contravention of the said regulation, the legal question remains whether the radio station had been negligent. This legally *implied* requirement of negligence is discussed in the following paragraph.

[6] The approach in such cases was described as follows in *S v Arenstein* 1964 (1) SA 361 (A) at 365C-D:

The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (*R v H* 1944 AD 121 at 125, 126; *R v Wallendorf and Others* 1920 AD 383 at 394.) Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (R v H (supra at 126).)' [2]

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP:* [3]

[86] The general rule of our common law is that criminal liability does not attach if there is no fault or blameworthy state of mind. This is expressed by the maxim: *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is a guilty mind). The fault element may take the form of either intention or negligence. This is true of both common law and statutory offences. (Footnotes omitted)

Also Justice Cameron (with whom four other Justices of the Constitutional Court concurred) stated as follows in *Democratic Alliance v African National Congress:*

[154] a further issue needs to be addressed. This also follows from the ground rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted 'false information'.

[2] See further *S v Qumbella* 1966 (4) SA 356 (A) at 364D-G; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H-611A; *S v De Blom* 1977 (3) SA 513 (A) at 532B-D.

[3] 2014 (5) SA 317 (CC).

This means that, in law, the author acted innocently. And the requirement of a guilty mind 'is not an incidental aspect of our law relating to crime and punishment, it lies at its heart'. *Strict criminal liability is therefore not easily countenanced. There is thus an interpretative presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are 'clear and convincing indications to the contrary*.[4] (Emphasis added and footnotes omitted)

There are also several judgments of the Supreme Court of Appeal and its predecessor[5] which include knowledge of possible unlawfulness as a requirement for responsibility where intention is required by a statute.[6] The authorities are also clear that the rule is also applicable where negligence is regarded as sufficient for the contravention. Thus even ignorance of the law may be a defence where the accused or respondent did not know or had no reasonable grounds to know the law.[7] Ignorance of the law was, however, not the defence put forward in this matter. The defence was simply that an error had been made by not checking the length of the PEB's.

[7] There are no indications, as set out above, than an innocent violation of the regulation would also amount to a contravention in law. There was no evidence that the radio station contravened the regulation knowingly. Ultimately, the question is, accordingly, whether the radio station was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case the management of a licensed radio station, *should* have known that the ten political advertisements were longer than one minute.

[8] Although the CCC has understanding for the complicated tasks of a community radio station, which usually has a limited staff, the CCC is of the view that the radio station was negligent in not having checked the lengths of the advertisements. The Broadcasting Compliance Division of ICASA held information sessions on the duties of a broadcaster during an election period. This, plus the mere fact of the municipal election, should have placed the radio station on special alert. The intention of Regulation 4(13) is that PEB's should not be longer than one minute. That ensures equal treatment of political parties. The Constitution of the Republic of South Africa guarantees free and fair

[4] 2015(2) SA 232(CC).
[5] The Appellate Division of the Supreme Court.
[6] Which includes so-called *dolus eventualis:* that is foresight of the possibility of unlawfulness and nevertheless acting – *see S v De Blom* 1977 (3) SA 513 (A).
[7] *S v De Blom* 1977(3) SA 513(A).

elections,[8] a guarantee which has been emphasised by the Constitutional Court as a cornerstone of our new democracy.[9]

FINDING

[9] In the result the CCC finds that the radio station has been negligent in having broadcast ten PEB's, which were all longer than one minute by an average of 46 seconds. The Regulations were, accordingly, contravened.

ADVICE AS TO THE ORDER BY COUNCIL

[10] As to sanction the usual possibilities as set out in section 17E(2) of the ICASA Act would apply. These possibilities must be read with section 4(3)(p) of the ICASA Act which (as amended from 2 June 2014) provides as follows:

(p) except where section 74(1) of the Electronic Communications Act applies, (the Authority) must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

Regulation 4(13) is, indeed, an instance where no penalty in the form of a fine is prescribed. However, as indicated above, the Council of ICASA may determine a penalty or remedy that is appropriate in such cases. The manager mentioned at the hearing that they had concentrated on the content of the advertisements – obviously since the station could be held legally liable for defamation or injury to dignity. In determining a just sanction, it should also be borne in mind that the radio station is a community broadcaster where sharing of profits does not take place. The station is not funded by external sources to meet its costs. Its only source of income is from advertisements. It has around 94000 listeners, which is rather small. On the other hand ICASA should demonstrate its discontent with the omission to check the length of each of the PEB's. A fine of R2000 would, in the circumstances, be fair.
However, an apology should also be broadcast for this error.

[8] Cf. section 19 of the Constitution of the RSA: (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

[9] See *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); *DA v ANC* 2015 (2) SA 232 (CC).

The proposal to Council is accordingly:

[1]The station must broadcast once per day for five consecutive days as its **first** item on its **news** service the following statement at a time between 07:00 and 20:10 – the first broadcast being within five days of being notified by ICASA of this judgment. Such times being notified by email to the Coordinator of the CCC at least 24 hours before the broadcast and such broadcast not being accompanied by any background music or sounds and the item being read formally by the **Station Manager, who must declare on air that he is the Station Manager:**

ICASA e fitlhetse gore seteishene se, se ne se le botlhaswa ka go se obamele melao ya ditlhopo. E gasitse dikgaso tsa makoko a sepolotiki(PEB) dile lesome tse fitileng motsotso o mongwe, mme se e ne e le kgatlhanong le melao ya ICASA ya ditlhopo gonne molao o letleletse motsotso o le mongwe fela. Aganang e tshwanetse go ikopa maitshwarelo go baretsi le ICASA ka tlolo melao e.

[The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Regulations. It broadcast ten party election broadcasts which lasted longer than one minute. This was in conflict with the ICASA Election Regulations, which limit such broadcasts to one minute each. Aganang extends its apology to its listeners and ICASA for these contraventions.]

An electronic copy of each broadcast, with time of broadcast, must be sent to the Coordinator of the Complaints and Compliance Committee by e-mail within 48 hours from the last broadcast.

[2] Secondly a fine of R2000 must be paid to ICASA within thirty calendar days from when this judgment is issued. The Coordinator will provide the radio station with the bank details of ICASA and the Coordinator must be copied with proof of payment within 24 hours from when the payment was made.

J. C. W. van Rooyen

JCW VAN ROOYEN SC

Chairperson of the CCC **22 September 2016**

The Members agreed with the finding on the merits and advice on sanction to the Council of ICASA.