



## COMPLAINTS AND COMPLIANCE COMMITTEE

**Date of Hearing: 6 October 2021**

**Case No: 406/2020**

**AVHAPFANI NEMAKHAVHANI**

**COMPLAINANT**

**v**

**CHOICE FM**

**RESPONDENT**

**CCC MEMBERS:**

Judge Thokozile Masipa – Chairperson  
Councillor Yolisa Kedama- 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  
Xola Mantshintshi - CCC Assessor  
Thamsanqa Mtolo - CCC Assessor  
Amukelani Vukeya - CCC Administrator

**LEGAL REPRESENTATION FOR PARTIES**

For the Complainant - Mr Andisa Mamathuba  
(an attorney)

For the Respondent - Mr Malange  
(an advocate)

---

**DRAFT JUDGMENT**

---

Judge Thokozile Masipa

## **1. INTRODUCTION**

- [1] The Complainant is Avhapfani Nemakhavhani, a member of the Thulamela Community in Thohoyandou.
- [2] The Respondent is Choice FM, a geographic Community sound broadcasting service. Its licence area is within the Thulamela Municipality area.
- [3] The licensee is Mutsindo Community Media Trust registered as a non-profit Trust. It owns both Choice FM and Energy FM. The relevance of Energy FM shall become clear later in this judgment.

## **2. THE COMPLAINT**

- [3] On 29 March 2021 the Complainant lodged a complaint with the CCC against the Respondent in which he made several allegations the details of which are set out hereunder.

## **3. DUAL ROLES**

- [4] The Complainant alleged that the Respondent had contravened the following:
- 4.1 Schedule 1, regulation 10A (7)(d) of the Standard Terms and Conditions Regulations for Class Licences, as amended.**

The said regulation states:

*“The Board of Directors /Trustees and Station Management must not occupy dual roles with regard to being managers/presenters at the radio station.”*

The allegation was that Mr Shonisani Muleya

occupied dual roles as a presenter, part of the management and Trustee of Choice FM.

- [5] The Respondent did not deny the allegation that Mr Muleya occupied dual roles as stated above. In addition, it undertook to remedy the non compliance. It was disclosed at the hearing that Mr Muleya had indeed resigned from the station. The resignation does not prevent the CCC from hearing the matter, as Muleya’s resignation came after the complaint had been lodged.

[6] I shall now deal with each of the remaining allegations in turn.

#### **4. COMMUNITY OWNERSHIP AND PARTICIPATION**

[7] **Regulation 13(1), (2) and (5) of the Community Broadcasting Services Regulations read with Schedule 1, Regulation 10A (7)(a) and (b) of the Standard Terms and Conditions Regulations for Class Licences as amended.**

The relevant regulations state:

*"(a) A Licensee must be owned by Community members with the Board of Directors as custodian of the License."*

*(b) A Licensee must encourage the community members within the coverage area to participate in ownership, management of television station or radio station."*

[8] The allegation is that Choice FM is not owned by Thulamela Community members.

Elaborating on this allegation the Complainant stated:

*"Choice FM/Mutsindo Community Media Trust is owned by Mr Shonisani Aubrey, Mr Simphiwe Mdlalose and Mr Stanley Luvhengo not by Thulamela Community.*

*Mr Mdlalose does not reside in the coverage area. He does not represent Thulamela Community.*

*Mr Muleya does not reside in the coverage area. He does not represent Thulamela Community.*

*Mr Luvhengo does not reside in the coverage area. He does not represent the Thulamela Community.*

*The licence area is Thulamela Local Municipality as per clause 3 of Mutsindo Community Media Trust Licence conditions*

*The above individuals comprise the Trustees of Choice FM and Board of Trustees."*

[9] A further allegation is that the Board of Trustees of Choice FM does not allow members of Thulamela Community to participate in the affairs of Choice FM.

[10] The Respondent denied that Choice FM was not owned by the Thulamela Community members. It also denied that the Board of Trustees of Choice FM did not allow members of the Thulamela Community to participate in the affairs of Choice FM.

[11] On the version of the Respondent, ownership of the station was done through a collage of community organizations/beneficiaries. The Respondent annexed NPO Certificates of all member organizations who, allegedly, make up the Board of Directors of Choice FM in accordance with its founding documents. The certificates are marked Appendix 2A.

[12] To demonstrate that participation by the community was allowed, the Respondent annexed a number of photographs purportedly demonstrating community engagement in the affairs of Choice FM. (I shall come back to this point later when I analyze the evidence).

[13] On page 38 of the bundle there is a list titled SENIOR MANAGEMENT: CHOICE FM.

The list has four names of Black South Africans who allegedly reside "in the footprint."

I pause to state that this fact was not controverted.

## **5. LOCAL ORIGINATING PROGRAMMES**

[14] **Regulation 10(1) of the Community Broadcasting Services Regulations of 2019** states:

*"The majority of programmes, news bulletins and current affairs broadcast by a community broadcasting service must be local originating programmed."*

[15] The allegation is that Choice FM does not broadcast local originating programmes, and that most of the content produced is not from the coverage

area. Choice FM is dependent on programming by Energy FM for news bulletins, current affairs, sports programmes and breakfast shows.

[16] The Respondent denied the allegation above. On its version, Choice FM syndicated programmes from Energy FM from 6h00 - 9h00 and 18h00 - 20h30 weekdays. This was in line with Regulation 10(2) of the Community Broadcasting Services Regulations of 2019 which allowed syndication of not more than 20% of the syndicated content, it was submitted. The remainder of the time was used for content by Choice FM. Such content was produced and broadcast by Choice FM.

### **News**

[10] According to the Respondent, the station broadcast its news bulletin between 7h00 and 18h00 with only two hours of syndicated programs having news from Energy FM, while the rest of the bulletins were by Choice FM.

### **Current Affairs**

[11] Further, it explained that current affairs programming and/or sport-related content did not have to be limited to stand-alone programmes but can be content that was broadcast in segments at any hour during normal programming.

[12] In addition, all shows on the station had features or segments to achieve such content. The Respondent gave an example of crossing live to press conferences as well as playing recorded interviews or recorded statements as they happened. It explained that there were current and sport related content in much of those programming that catered for the community and complied with Regulation 10(1) of the Community Broadcasting Services Regulations of 2019.

[13] Although the Complainant had a right of reply, he could not gainsay any of the above averments.

## **6. POLICIES DEALING WITH PROGRAMMING MATTERS**

**[14] Regulation 10(3) of the Community Broadcasting Services Regulations of 2019** states that:

*"A Licensee must have policies dealing with programming matters that include, among others,*

*(a) mechanisms for community participation;*

*(b) programming format; and*

*(c) language policy."*

[15] The allegation is that Choice FM does not have policies dealing with mechanisms for community participation, programming format and language policy.

[16] In response, the Respondent denied the allegations and stated that it did have operational policies to manage the operation of the station. These policies were known to its employees and available, on request, to any member of the public.

[17] The Respondent further stated that because the Regulations were enacted after Choice FM was licensed, the station was still experiencing *"teething challenges in relation to having policies as explicit those in the Regulations."* In this regard, the Respondent undertook to

*"strive to align and/or finalise our community programming policy document by the end of the financial year in order to comply with the above-mentioned regulations."* (I shall come

back to this contradiction later in my judgment).

## **7. PROGRAMMING COUNCILS/COMMITTEES**

**[18] Regulations 13(3) and (4) of the Community Broadcasting Services Regulations** state that:

*"(3) A Licensee must establish programming councils/committees to enable community members to participate in the selection and provision of programmes."*

*"(4) The programming councils or committees must be representative of different interest groups within the community served, such as youth, women, or people with disabilities."*

[19] The allegation is that the radio station does not have programming committees which enable community members to participate in the programming of Choice FM.

[20] The Respondent denied the allegation. It stated that Choice FM has sectorial membership with beneficiaries/members organization that are part of the Board and part of the community programming committees. The Respondent attached Appendix 5A (as proof of programming committee and pictures of how the Respondent interact with various sections of the community directly and through its member organizations.

[21] Choice FM also denied the allegations that it did not have policies dealing with mechanisms for community participation, programming format and language policy. It stated that it had put in place operational policies to manage the operation of the radio station. The employees of the Respondent were familiar with such policies. As far as Choice FM was aware no one from outside the radio had ever asked to see such policies. The claim, therefore, that such policies did not exist was unwarranted, argued the Respondent.

## **8. ANALYSIS OF THE EVIDENCE**

[22] As can be seen above, serious allegations of non compliance of various regulations were made against the Respondent. One would have expected a direct response of either an admission or a denial as well as the basis of such a response. The Respondent correctly made an admission that Mr Muleya occupied dual roles in contravention of the applicable regulations and undertook to remedy the issue. The resignation of Mr Muleya from the station might have been an attempt to do just that.

[19] The Respondent also denied that it had failed to comply with Regulations 10(1) and 10(3) of the applicable regulations. However, for some inexplicable reasons, it then took a wishy washy approach in presenting part of its case. I say this because it made a number of indirect concessions some of which made no sense at all. For instance, it denied an allegation that the station had no programming policies. In the same breath it stated that the station had

*"teething challenges in relation to having policies as explicit as the ones required by the regulations concerned."* This renders the statement disingenuous as an admission of a fact and its denial cannot exist side by side.

[20] It is so that allegations remain mere allegations until they have been proven true. However, it is for the Respondent to raise a defence that makes sense. In the present matter, the inconsistencies in the case of Choice FM made it difficult for the CCC to understand the nature and the scope of its defence. As a result, the CCC forwarded a number questions to counsel for Choice FM to get clarity on pertinent issues.

[21] Most of the questions asked related to the key principles of a community sound broadcasting service, namely:— independence, governance and service. Counsel was requested to furnish the CCC with written supplementary submissions on specific questions mainly to respond to the allegations that the Thulamela community neither owned nor controlled Choice FM. The submissions were duly submitted and the CCC is indebted to counsel for his assistance.

[22] As some of the questions and issues discussed elsewhere in this judgment overlap, it shall serve no purpose to repeat them. I have selected only those I considered were strictly necessary but for the sake of completeness they shall be quoted *verbatim*.

[23] To the question: Was the Board of Directors for Choice FM elected by the community of Thulamela? the Respondent recorded the following response:



***"The Board members of Choice FM are elected through member organizations who are beneficiaries in Schedule 2 of the Mutsindo Community Media Trust. We have member organizations who each hold elections and nominate/elect a member and thus submit their representative member to the Board of Choice FM (See annexure 2.2 of the nomination forms). Each of the beneficiary has a permanent seat in the Board of Choice FM and thus through their own internal process would nominate and second a representative from their organization to occupy that seat:***

***Clause 4.3 of our service licence refers: The Licensee shall hold AGMs for the following purposes (3) To elect members of the controlling structure e.g., Board of Directors, Trustees etc. subject to the Licensees founding documents. The process above is in accordance with our founding documents."***

- [24] The question: Does the community of Thulamela own Choice FM or not? Please substantiate your answer with evidence, prompted the following response:

***"The definition of community broadcasting in the EC Act (d) refers community broadcasting service may be funded by donations, grants, sponsorship or advertising or membership fees, or by any combination of the aforementioned. Our reading is that if there is an inclusion of membership fees in the funding of the radio station, this would be under the assumption that there is membership of the radio station and/or licensed entity. The Board of Choice FM is made up of representatives from the member organizations who are beneficiaries under Schedule 2 and reside within Choice FM coverage area, and thereby control "own" Choice FM.***

***The "ownership" of broadcasting community service is through the controlling structure. The representative are nominated and elected from community members and are there to represent their***

***aspirations accordingly since the whole community cannot sit in the controlling structure.”***

[25] The next question was: Please provide evidence of community participation by the members of Thulamela community in respect to programming for Choice FM? This question arose from, *inter alia*, an allegation from the Complainant that the last AGM for Choice FM was held in 2015. The allegation proved to be without foundation as can be seen from the response on behalf of Choice FM.

The response was:

***“We have in the bundle included the attendance register on page 21 - 22 and 28 and 29 of the bundle. Please note that we are unable to retrieve the minutes thereof. But we have the community programming committee for 2021 as annexure 1.3 and attendance register thereof because of change of station manager.”***

[26] To the question: How many Annual General Meetings (AGMs) were held, wherein there was community participation since the inception of Choice FM? Please substantiate your answer with evidence.

The response was:

***“The radio station went on air in October 2016 and had to operate a full financial year in order to report back on the operational and financial performance of the station. The financials are normally prepared after four (4) to six (6) months after the financial year end, hence the first AGM was in 2018 to report back on the 2017 financial year.”***

[27] Counsel for the Respondent then explained that AGMs' were held again in 2019 and 2021. In 2020 no AGM was held because of the COVID-19 pandemic. He then referred the CCC to pages 43 - 47, and 65 - 66 of the bundle.

[28] The pages 43 - 47 contain the agenda, the minutes as well as the attendance register of the AGM that took place on 21 October 2018. Pages 65 and 66 is a record of the proceedings of the AGM in 2019.

## 9. CONCLUSION

[29] An analysis of the facts above, shows that there is indeed a semblance of community participation in the affairs of Choice FM. Similarly, ownership of the station appears to be in the hands of the Community. But appearances and the reality are two different things. I say this because Choice FM provided the CCC with photographs in support of its contention that the station does include the community in its affairs. However, apart from captions such as "Community Engagement", there is nothing to indicate the nature of the engagement or involvement and the identity of the community involved. Notably none of the photographs are linked to any of the AGMs that took place in 2018, 2019 and 2021. The photographs are, therefore, unfortunately of no assistance in proving community participation.

[30] At the AGM of 21 October 2018, in particular, it seems to me, that the focus was on the welfare of the beneficiaries rather than on the participation of the Community of Thulamela in the affairs of Choice FM. On page 44 of the bundle, item 3 in the minutes refers to the introduction of the beneficiaries. Item 6 on page 45 is subtitled "**Updates from beneficiaries**". The update then reads thus:

*"All Board members reported that they were grateful for the station's existence and this has uplifted the profile of their organizations and the relationship they have with the communities they serve and wish for a longer and sustainable longevity of the station."*

[31] The above gives an impression that although the meeting was labeled an AGM, apart from the station's report, which, in fairness to the Respondent is impressive, the meeting was really about the beneficiaries.

[32] Notably, there is no indication on the papers of how the meeting was publicized and how the participants in the AGM were invited. So, although documentary evidence was provided as proof of community ownership and community participation the so-called evidence was far from convincing. I say this for the following reasons:

32.1 In Respondent's own version the community is represented in the controlling structure through a collage of beneficiary organizations.

32.2 By their very nature, these beneficiaries cannot represent the whole community but only a section thereof.

[33] Similarly, a perusal of the minutes of the AGM dated 30 October 2019, on pages 65 and 66 leads to a similar conclusion, that the beneficiaries are almost usurping the position or functions of the community.

[34] On page 66 under item 6 -

**"Updates from Beneficiary organizations"**, it is recorded:

*"There was overwhelming support and show of confidence in Choice FM by beneficiary organizations who acknowledged and complimented the excellent work done by Station Manager under the period under review."*

[35] From this it can be deduced that it is the beneficiaries who dominate the proceedings of the AGM even as participants, while the role of the rest of the community members is relegated to the background. This is also supported by the attendance register on pages 46 and 47. The attendance register is divided into four headings namely:-

Names; Organizations; Cell Number;and Signature

Notably, there are only three names of people who apparently do not represent any organization. This gives an impression that members of the community who do not belong to any organization are not likely to take part in the affairs of the station. Lastly, in both AGMs in 2018 and 2019 there is no indication of how the participants came to know about the meetings.

[36] It is important to state that there is more than enough evidence to show that, to its credit, Choice FM, is doing excellently in the area of “ploughing back to the community.” Its concern for human welfare cannot be doubted. That, however, is different from community participation in the affairs of the station. The key in running a successful community radio station is to let the community run the station and not run it on behalf of the community.

[37] Beneficiaries mostly play a passive role in the affairs of a benefactor, (in this case a Community Broadcasting Service). On the other hand, community members are expected to fully and meaningfully play a role in every area of running the affairs of the station. They are expected to be involved in all operations, making decisions on management, policy, programming etc. They also elect members of the Board at the Annual General Meeting. Their input is, therefore, felt in every area of the business of the broadcaster. But the community members must form part of the broader community not a section thereof, as appears to be the case in this matter.

[38] Although it can be argued that the beneficiaries are part of the community, in the present case, it is doubtful that they can be said to represent the community. At best, the representatives on the governing structure represent the individual beneficiary organizations (which is just a section of the community), not the community as a whole.

This bears repetition as it was not even clear how Choice FM selected the beneficiary organizations it chose to assist.

[39] It appears that the beneficiary groups are picked at random. If that is so they cannot possibly be representing the community of Thulamela. So, the fact that the beneficiary members are represented in the Board does not mean that they represent the community of Thulamela.

[40] For the above reasons I would uphold the complaint with regard to lack of community participation and lack of ownership of the station by the community.

[41] With regard to policies dealing with programming, the Respondent denied the allegation that there was none, and then added a puzzling response to the effect that the station had

***"teething challenges in relation to having policies as explicit as the ones required by the regulations concerned."***

[42] Such a vacillating response is not reassuring at all, especially because there was no attempt by the Respondent to explain it. More importantly, counsel for the Respondent did not take the opportunity to explain the statement or put it in perspective when he was asked to make additional written submissions.

[43] The only reasonable conclusion is that the Respondent found it necessary to phrase its defence in the manner that it did because there are no programming policies.

[44] The above is a lame defence as the nature of the "teething challenges" were not even explained anywhere - either in the pleadings or in the submissions. So too is the fact that Choice FM is only a few years old. Similarly, the fact that the applicable regulations were enacted after Choice FM had been issued with a licence, can never be a valid defence. All licensees are expected to be vigilant and keep abreast of the changes of the laws that affect them as they must operate within the law. For that reason, I would uphold the complaint.

## **10. PROGRAMMING COUNCILS/COMMITTEES**

[45] The complaint relating to programming

councils/committees are inextricably linked to the complaint about lack of community participation and ownership. The very same community that the Respondent alleges takes part in the affairs of the station is the same community that forms programming councils/committees. In other words, the programming committees/council comprise members of the beneficiary groups, which in my view, do not represent the community. For that reason, I would uphold the complaint in this regard.

## 11. FINDING

[45] In the result, with reference to the complaints hereunder, the CCC makes the following finding:

### **45.1 Schedule 1 Regulation 10A (7) (d) of the Regulations on Standard Terms and Conditions for Class Licences as amended on 30 March 2016-**

“The Board of Directors/Trustees and Station Management must not occupy dual roles with regard to being managers/presenters at the radio station” - The allegation is that Mr Shonisani Muleya is occupying dual roles as a presenter, part of management and Trustees of Chioce FM - The Respondent admitted the non compliance and Mr Muleya resigned from the station. -

The complaint is **upheld**.

### **45.2 Regulation 13(1), (2) and 5 of the Community Broadcasting Services read with Schedule 1 Regulation 10(A) (7)(a) and (b) of the Standard Terms and Conditions Regulations for Class Licences as amended**

reads:

“(a) A Licensee must be owned by Community members with the Board of Directors as custodian of the Licence.”

(b) A Licensee must encourage the community members within its coverage area to participate in ownership, management of a television station or a radio station.” -

Two allegations flow from this, namely:-

- Choice FM is not owned by Thulamela community members.
- The Board of Trustees of Choice FM do not allow community members to partake in the affairs of Choice FM -

Although there is a semblance community participation, reliable evidence shows that the purported “community representatives,” actually represent only a section of the community.

For that reason, the complaint is **upheld**.

#### **45.3 Regulation 10(1) of the Community Broadcasting Services Regulations of 2019 -**

“Majority of programmes, news bulletins, and current affairs broadcast by a Community Broadcasting Service must be local originating programmes.” - The allegation is that Choice FM does not broadcast local originating programmes. It is alleged that most of the content produced is not from the coverage area as Choice FM is dependent on programming by Energy FM for news bulletins, current affairs, sports programmes and breakfast shows. The Respondent denied this allegation and the Complaint failed to substantiate the allegation.

The complaint is **not upheld**.

#### **45.4 Regulation 10(3) of the Community Broadcasting Services Regulations of 2019 -**

“A Licensee must have policies dealing with programming matters that include, among others,

- (a) mechanisms for community participation;
- (b) programming format;
- (c) language policy.”

The allegation is that Choice FM does not have policies dealing with mechanisms for community participation, programming format and language policy - No valid defence was raised.

The complaint is **upheld**



**45.5 Regulation 13 (3) and 4 of the Community Broadcasting Services Regulations** state:

“(3) A Licensee must establish programming councils/committees to enable community members to participate in the selection and provision of programmes.”

“(4) The programming councils/committees must be representative of different interest groups within the community served such as youth, women, or people with disabilities.” -

The allegation is that the radio station does not have programming committees, which enables community members to participate in the programming of Choice FM. Although this was denied there is ample and reliable evidence to suggest that individuals who may be in the programming councils/committees represent only a section of the community. -

As a result, the complaint is **upheld**.

## **12. ORDER**

[46] The CCC recommends the following order to be issued by ICASA against the Respondent

46.1 The Licensee is directed to desist from any further contravention of the above-mentioned regulations;

46.2 The Licensee is directed to take the following remedial action:

46.2.1 convene an AGM at which an election of members of the Board shall take place, within 45 days after ICASA has published its Finding and Order;

46.2.2 give notice to the public of the AGM concerned by announcing the venue, date and time of the AGM on air, once at the end of news bulletins, daily, one week before the date of the meeting.

46.3 The Licensee is directed to pay as a fine an amount of R15000 in respect of non compliance mentioned in paragraph 46.1 above. Such fine to be paid within 30 days after ICASA has published its decision.



---

**Judge Thokozile Masipa**

**CCC Chairperson**

