

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date heard: 5 March 2020

CASE NR: 358/2019

In the matter of Histotrim Pty Ltd (“ BEAT 105.2 FM”)

Referred by COMPLIANCE AND CONSUMER AFFAIRS ICASA

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)
Councillor Dimakatso Qocha
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

On behalf of the CCA: Ms B Mashigo (Manager) accompanied by Ms F Hlongwane (Senior Manager)

On behalf of BEAT FM: Mr L Pierce from Phukubje Pierce Masithela Attorneys
From the Coordinator’s Office: Ms M Lalla.

Coordinator of the CCC: Ms L Mabulu

JUDGMENT

JCW VAN ROOYEN [1] Histotrim (Pty) Ltd, also known as BEAT FM, a Sound Broadcasting licensee, was issued by ICASA with a broadcasting licence on 7 December 2015. BEAT FM was referred to the Complaints and Compliance

¹ The Complaints and Compliance Committee (“CCC”) is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from e.g. the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the ICASA ACT 2000, Electronic Communications Act 2005, Broadcasting Act 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 an order against the licensee. Council then considers an order 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.

Committee (“CCC”) at ICASA on the instruction of the then General Manager of the Compliance and Consumer Affairs Division (“CCA”) at ICASA. The radio station’s licence specifies the Free State Province as its geographical coverage area and it has a duty to broadcast 60% in English and 40% in Sesotho.

The General Manager informed the Licensee that the matter would be referred to the CCC on 2 September 2019. The ground for the reference was the alleged contravention of Regulation 5(1) and 5(2) of Schedule 1 of the 2010 Standard Terms and Conditions for Individual Licences as amended in 2016.² That would, of necessity, include regulation 5(3), which is also alluded to hereunder:

[2] Regulation 5 as amended in 2016 provides as follows:

5. Commencement of operations

- (1) A Licensee must commence operation of the Broadcasting Service specified in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) twelve months from the date of issue in respect of free to air sound BS;**
 - (b) ...
 - (c) ...
- (2) A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**
- (3) An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**
- (4) ...
- (5) ...

[3] Regulation 14 as amended in 2016 provides as follows:

Contraventions and penalties

- (1) Any person that contravenes regulations 6, 7, 9, 10 and 12 is liable to a fine not less than R100 000, 00 but not exceeding R5 000 000 or 10% of the Licensee’s annual turnover

- whichever is the greater - for every day or part thereof during which the offence is continued.

² GNR.523 of 14 June 2010: Regulations: Standards terms and conditions for individual licences (Government Gazette No. 33294) as amended by Notice 158, published in Government Gazette 39875 dated 30 March 2016 and Notice 699, published in Government Gazette 40372 dated 26 October 2016.

- (2) Any person that contravenes any other regulation, not specified in sub-regulation (1), **except regulation 5**, is liable to a fine not less than R10 000 but not exceeding R100 000, 00.
- (3) A person found guilty of a contravention in terms of sub-regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.
- (4) Failure to commence with operations in terms of regulation 5 will result in the revocation of a licence. (Emphasis added)**

[Reg. 14 substituted by Gen N 158/2016]

[4] Ms Mashigo, Manager of the CCA, argued that despite a formal extension granted and, despite the Division having shown appreciation for the reasons put forward for the lapse of time, the CCA, as instructed by the then General Manager, referred the matter to the CCC. The General Manager, in correspondence with BEAT FM referred to Regulation 5 of the Standard Terms and Conditions for Individual Licences 2010 as amended in 2016. Four years had gone by and, despite an extension granted, BEAT FM had not commenced broadcasting within the prescribed time limit, as set out in the Regulations. It is true that it has commenced to broadcast music and identified the station on air as required. The said broadcast cannot, however, in law, be regarded as “broadcasting” since it would circumvent the law by way of an obvious superficial mechanism. In fact, the often quoted legal adage “*plus valet quod agitur, quam quod simulate concipitur*”³ applies. Translated, it means that the

³ Thus Innes CJ stated as follows in *Zandberg v Van Zyl* 1910 AD 302 at 309: Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. *For if the parties in fact mean that a contract shall have effect in*

Law is not blind to mechanisms which attempt to circumvent the law. On the other hand, the *audi alteram partem* rule⁴ is a fundamental requirement of our law and thus, BEAT FM also had to be heard before a decision could be arrived at by the CCC. Ultimately, BEAT FM's view at the hearing was that it would need eight months to be on air. It was stated that it could reach parts of its audience at this stage, but that that would affect the station's plan (which was regarded as extremely important from a strategic point of view) to commence its broadcast in all its areas (including the area of its sister station, Rhythm FM)⁵ on the same date. It also needed time to provide training to presenters and other employees. Further, it is also dependent on grants. Giving evidence, the Managing Director stated that the mere fact that this matter (and that of RHYTHM FM) had been referred to the CCC has created concerns amongst its donors and investors and a period of uncertainty. It was, however, not denied that the CCA had reason to refer the matter to the CCC.

[5] The CCC requested the parties, after the close of the proceedings, whether the charge should not have been brought under the unamended 2010 regulations, since the Broadcasting licence had been issued before the 2016 amendments to the Regulations were made. Both parties (in written argument) agreed that the essence of the matter relates to what took place after the 2016 amending Regulations were published. The CCC has, thus, agreed that the 2016 amended Regulations are applicable. Gratitude is expressed to the parties to the matter for the expertise and speed within which the request for argument in this regard was responded to.

[6] Once again, Regulation 5, as amended in 2016, is quoted.

accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.' (Emphasis added)

⁴ "Hearing the other side"

⁵ See the CCC judgment in case no 357/2019 – also on the ICASA Webpage.

5. Commencement of operations

- (1) A Licensee must commence operation of the Broadcasting Service **specified** in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) **twelve months from the date of issue in respect of free to air sound BS;**
 - ...
 - (2) **A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**
 - (3) **An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**
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Regulation 14, as amended in 2016, provides as follows:

Contraventions and penalties

- (1) Any person that contravenes regulations 6, 7, 9, 10 and 12 is liable to a fine not less than R100 000, 00 (One hundred thousand Rand) but not exceeding R5 000 000, 00 (Five million Rand) or 10% of the Licensee's annual turnover - whichever is the greater - for every day or part thereof during which the offence is continued.
- (2) Any person that contravenes any other regulation, not specified in sub-regulation (1), **except regulation 5**, is liable to a fine not less than R10 000, 00 but not exceeding R100 000, 00.
- (3) A person found guilty of a contravention in terms of sub-regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.
- (4) Failure to commence with operations in terms of **regulation 5** will result in the revocation of a licence.[Reg. 14 substituted by Gen N 158/2016] (Emphasis added)

[7] An observation at this stage: it is significant to note that a contravention of Regulation 5 (not commencing to broadcast timeously) does not attract a fine. Failure to commence "will result in the revocation of the licence." Such revocation has, however, not taken place. It would, in any case, have had to be

heard by the CCC, before a withdrawal by Council could take place. A revocation of the licence was also not on the agenda for this hearing. Given the four years that have lapsed since the licence had been issued as well as the addition of frequency licences, which took time, the ultimate plea of the CCA at the hearing of this matter was that the CCC advise Council to issue a final date for making the license operational. A withdrawal of the licences was, accordingly, not on the agenda.

BACKGROUND TO THE MATTER BEFORE THE CCC

[8] It is of value to consider the background to this matter as set out by the Managing Director of BEAT FM, Mr Given Mkhari, as to the reasons why timelines could not be abided by. It is to be noted that the essence of the problems lay in the widening of spectrum of BEAT FM and, especially, its Sister Station, RHYTHM FM. It was a matter of strategic policy that the two stations should commence their broadcast on the same date for service and publicity purposes. The background as sketched by Mr Mkhari is rather lengthy - some lesser important aspects will thus be omitted.

1 Introduction

1.1 BEAT FM is owned by a Consortium of Black individuals and Small and Medium Enterprises, the majority of which are based in the Free State. The said individuals and SMME's are new entrants in the Sound Broadcasting sector. MSG Afrika Group (MAG), a 100% Black owned company operating in the media and communications industry, is a 19.9% shareholder in BEAT FM. Ownership consists of 100% previously disadvantaged persons.

1.2 MAG funded the establishment costs of the license application and the initial set up costs prior to securing full approval by the funders.

- 1.3 During the application process and subsequent to securing the Sound Broadcasting and Service License for the Free State, the Consortium set about finalising the terms of indicative funding from Developmental Funding Institutions, namely the industrial Development Corporation (IDC) and the National Empowerment Fund (NEF).
- 1.4 Both institutions agreed to fund the station(s) with a set number of conditions, key of which was that MAG, its shareholders and directors provides their balance sheet and related security requirements.
- 1.5 Furthermore, MAG was required by the funders to establish a radio focused entity, MSG Afrika Broadcasting (MAB), to house the radio broadcasting interests, wherein the NEF would become a 10% ordinary shareholder and the IDC would become a 10% preference shareholder in MAB.
- 1.6 Once the above conditions were met, the IDC and NEF provided funding to MAB with the legal agreements that MAB would further lend to BEAT FM and RHYTHM FM on similar terms that were advanced to MAB.
- 1.7 The reasons for this funding structure was firstly that the funders were confident of the recoverability of their funds from MAG given the limited balance sheets and security of assets of the rest of the Consortium members of BEAT FM.
- 1.8 Secondly, the funders were comfortable to fund a more enlarged business given that they were of the opinion that the Free State and the Eastern Cape markets are too small to individually sustain new entrants in a stagnant economic environment.
- 1.9 The funders were of the view that the new stations would augment each other while enjoying the support of the existing MAB operated radio stations, namely POWER 98.7 and Capricorn FM. Accordingly cash flows from MAB established stations would be deployed to service the debt obligations of BEAT FM and RHYTHM FM, thus allowing the new stations

ample time and space to gain audience and revenue traction with minimal pressure to service debt obligations in the earlier years.

- 1.10 Such funds are provided on a financial drawdown basis subject to various performance milestones being met by the new stations to the satisfaction of the IDC and the NEF. *Thus, BEAT FM and RHYTHM FM are funded on similar terms and through similar funding instruments via funding facilities advanced via MAB. (Emphasis added)*

While the funders and operators understand and acknowledge that the Licensees are individual and separate license holders, due to commercial viability considerations, *the planned intention had been to launch and operate around a similar period to benefit from their combined scale. For example, contracts with studio and equipment providers, signal provision contract with SENTECH, as well as advertising and marketing services were entered into simultaneously to leverage the combined scale of the stations. (Emphasis added)*

The Authority's licensing objectives

- 2.1 The Authority's decisions to license individual commercial free-to-air sound broadcasting service (I-BS) licences in the geographical markets of the Free State and Eastern Cape Provinces (secondary markets) are consistent with the objectives set out in the Electronic Communications Act including:
- 2.1.1 promoting an environment of open, fair and non-discriminatory access to the broadcasting services;
 - 2.1.2 promoting the empowerment of HDP's, including Black people, with particular attention to the needs of women, opportunities for the youth and challenges for people with disabilities;
 - 2.1.3 promoting the development of commercial broadcasting service with are responsive to the needs of the public;
 - 2.1.4 ensuring that commercial and community broadcasting licenses, viewed collectively, are controlled by persons or groups of person from diverse range of communities;

- 2.1.5 nurture and encourage investment, including strategic infrastructure investment, and innovation in the communications sector;
 - 2.1.6 ensure efficient use of the radio frequency spectrum;
 - 2.1.7 promote competition within the ICT sector;
 - 2.1.8 ensure information security and network reliability;
 - 2.1.9 promote stability in the ICT sector;
 - 2.1.10 ensure the broadcasting services are effectively controlled by South Africans;
- 2.2 The licensee is a new entrant in a secondary market, funded through debt and equity instruments by Development Finance Institutions (DFI). It is not an established player with significant resources, unlike existing players in the market with which it must compete from day one of its operations.

3 Spectrum amendments required for optimal viability

- 3.1 *From the outset, during its application for the license and at the application hearings of 22 August 2013 the BEAT FM Consortium submitted to the Authority that its application was for the entire Free State province. It submitted that while the published map at the time only reflected Bloemfontein, it would upon award work with both the Authority and SENTECH to find a suitable solution for the spectrum limitations in the province. (Emphasis added)*
- 3.2 Upon award the Licensee commenced engagements with the Authority, with the support of SENTECH's technical teams by submitting applications for spectrum amendments, to ensure that its broadcast footprint would cover most, if not all, of the Free State service area. The Licensee has motivated, eventually successfully, for the increase in the number of transmitters it may use.
- 3.3 Accordingly, between April 2016 and March 2018 the Licensee submitted various spectrum amendments applications to the Authority.
- 3.4 Parallel to the process outlined above in August 2016, BEAT FM submitted an application for Extension of Commencement Date to the Authority. At the time of the application BEAT FM was confident that the Authority would hopefully approve the spectrum amendment applications in the first half of 2017.

- 3.4.1 upon the Authority granting the extension on 29 June 2017, BEAT FM commenced airing music and station identity content while in anticipation of the licensing of additional sites;
- 3.4.2 *initially proposed Free State expansion solution comprised additional transmitters at each of Bethlehem, Kimberley, Kroonstad, Petrus Steyn, Harrismith and Senekal and would have provided a combined coverage over 7 sites; (Emphasis added)*
- 3.4.3 engagements were held with the Authority, in effort to mitigate the coverage limitations;
- 3.4.4 in March 2018 the Authority licensed five of the seven proposed sites, for the reason of interference and/or frequencies being allocated to other broadcasters already.**

Item	Station Name	Code	Freq(MHz)	TxPower(ks)	ERP(KW)	Population coverage
1	Bloemfontein	061	105.2	3	30	739 902
2	Kimberley	060	95.4	1	10	992
3	Senekal	073	107.6	1	10	30 001
4	Harrismith	0131	96	1	10	202 405
5	Petrus Steyn	085	99.5	1	10	86 235

4 Funders and shareholders' considerations

- 4.1 As described above, the Licensee has been consistent in demonstrating its commitment to introducing a new entrant in the Free State in line with its application to the Authority.
- 4.2 Experience has shown that a “false start” can “burn cash”, alienate audiences and advertisers and delay or frustrate the ability of a broadcaster to become viable in a competitor market. The new entrant must launch with the best possible chance to succeed. (Emphasis added)**
- 4.3 The **depressed economic environment** in South Africa has further heightened the need for financial prudence particularly for emerging small to medium enterprises. The sensitivity to prudence and responsible spending is one that funded projects like a Greenfield radio station are intensively exposed to.
- 4.4 As earlier outlined, the majority of BEAT FM's shareholders are previously disadvantaged individuals and small businesses that do not enjoy any

financial room for error. **The project does not have space to incur the risk and cost of launching prematurely, by broadcasting prematurely, by broadcasting to a limited audience in a secondary market while competing with established regional and national commercial operators. The Licensee is of the considered view that it needs to resume full operations with the best possible chance to secure a viable and sustainable listener base. (Emphasis added)**

- 4.5 To commence operations in such a competitive market, the Licensee required secured funding from the IDC and NEF. However supportive the DFI's are, they nevertheless insist on prudent investing and have insisted on obtaining assurances regarding the viability of the Licensee before advancing the full amounts of funding committed to the Licensee.
- 4.6 To this end the IDC and NEF have made it clear that:
- 4.6.1 the funding be advanced to and secured against the assets of one of the Licensee's shareholders, MSG Afrika Broadcasting ("MAB"), which also holds an interest in BEAT FM/BEATFM;
- 4.6.2 MAB demonstrated that it would be able to offer to advertisers a sustainable portfolio of audiences;
- 4.6.3 accordingly, that both the BEAT FM and RHYTHM FM Licences demonstrate that their broadcast footprints cover a viable listener base.

5 Contraventions as stated in the charge sheet

- 5.1 We acknowledge having omitted to request for an extension of Commencement for BEAT FM. This oversight has primarily been due to our focus in securing the additional transmission sites to ensure the overall business' viability and sustainability.
- 5.2 While in 2018 the Authority finally approved additional transmission sites for BEAT FM and RHYTHM FM, our ability to draw down on funding was linked to the successful resolution of RHYTHM's East London transmission sight. We did not anticipate that it would take a while for the Authority to license the East London application...
- 5.3 Assuming the timely resolution of this CCC matter by end November 2019, the Licensee intends to seek the indulgence of the Authority to enable the completion of launch by May 2020.

6 Readiness to launch the broadcasting services

- 6.1 To date, R11 888 702.00 has been deployed on BEAT FM.
- 6.2 We have been cautious in not incurring further costs without clear view of the launch date.
- 6.3 Our funders and we are concerned about the implications of this CCC enquiry.
- 6.4 We are approaching the December / January downtime which are customary in the South African economy.
- 6.5 In our launch plans we have provided for 2 months training and on-air rehearsals prior to going on air.
- 6.6 Our talent recruitment drive is conditional upon finalising a launch date.

- 6.7 Assuming this CCC enquiry being finalised by November 2019, we are confident in being able to launch full services by May 2020.

7 Conclusion

- 7.1 After all the effort that the Licensee and the Authority have expended in determining an appropriate, if not optimum, coverage area for the Licensee, it is clear that the Licensee is poised to optimally make use of the spectrum allocated to it.
- 7.2 Various stakeholders, including shareholders, employees, landlords, suppliers and funders, have committed resources to ensure that a viable radio service is launched. We have committed to a long term lease and have deployed infrastructure in studio facilities and equipment.
- 7.3 The Authority has invested time, resources and sound judgment in awarding the service license and subsequent spectrum licenses to BEAT FM.
- 7.4 **We remain deeply appreciative of the opportunity that has been afforded to the BEAT FM Consortium. We sincerely regret the inconvenience that has been occasioned by the lapse of time between formal issue of our license to date and remain committed to put all efforts to ensure that BEAT FM finally launches a full service with the best chances to succeed and that valuable spectrum is efficiently put to use. (Emphasis added)**
- 7.5 Given our state of readiness, we humbly submit that no other Licensee can apply better use of the spectrum allocated to us and reasonably launch an alternative service in the broadcast area sooner than BEAT FM.

7.6 We have notified our funders about the current proceedings and have impressed to them the urgency of rolling out the final stages of commencement of operations to avoid any further similar complaints being lodged against us.

7.7 BEAT FM and RHYTHM FM's financial drawdowns are dependent on their combined commercial viability and compliance certainly. We humbly request the Authority to finalise the current enquiry.

Signed: *Given Mkhari*

CONCLUSION BY THE CCC

[9] This is one of the matters which demonstrates that, given the intricacies of setting up a radio station – and in this case, over a wide area – the matter cannot simply be addressed by resorting to a strict application of the Regulations. In fact, the approach by the CCA to the matter was a pragmatic and equitable approach which, in the special circumstances of this matter, was justified. However, it reached a point where the matter had to be referred to the CCC so as to provide direction to the matter and advise Council as to an order both in regard to BEAT FM and RHYTHM FM.

[10] An further perusal of Regulation 5 is necessary :

- (1) A Licensee must commence operation of the BS specified in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) **twelve months from the date of issue in respect of free to air sound BS;**
- (2) **A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**

- (3) An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**

The “sanction” for omitting to commence broadcasting is to be found in Regulation 11(4), which provides as follows:

- (4) Failure to commence with operations in terms of regulation 5 will result in the revocation of a licence.

No other “sanction” is prescribed. It was common cause that no such revocation had taken place - and that any revocation could, procedurally, only have taken place by way of an order by Council on the advice of the CCC. However, it is clear that the CCA bent over backwards in, understandably, accommodating both BEATFM and RHYTHM FM. The CCA has also not requested that the licences be cancelled. It simply did its duty and argued that a time limit should be advised to Council by the CCC. And that was, indeed, the only legally permissible route to take. The matter must also be considered in the light of the Sotho speaking communities involved: communities which have a fundamental right in terms of section 9(2) of the Constitution of the RSA and the Broadcasting Act 1999⁶ to rectification in the light of the wracking⁷ apartheid past. Furthermore, these

⁶ See section 9 of the Constitution of the RSA; and also the Preamble to the Broadcasting Act 1999: “REALISING that the broadcasting system must reflect the identity and diverse nature of South Africa, is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds, religious backgrounds and official languages in the Republic. Also compare section 9 of the Electronic Communications Act 2005: (1) Any person may, upon invitation by the Authority, subject to the provisions of this Act, apply for an individual licence in the prescribed manner.(2) The Authority must give notice of the application in the *Gazette* and -(a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice;(b)include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;

⁷ President Abraham Lincoln in his Gettysburg Address on Thursday 19 November 1863, commemorating the sacrifice of those from both sides who died at the Battle of Gettysburg during the American Civil War. See Shapiro *The Yale Book of Quotations* (Yale University Press 2006) at 463. Also see Wallis AJ in *Kham v EC* 2016 (2) SA 338 (CC). Since the Address was not written, some versions do not include the word “wrack.” Nevertheless, the word “wracked” is in the CCC’s view the most fitting word.

communities have the fundamental right to be informed, in terms of section 16 of the Constitution of the RSA.⁸

[11] *The CCC was informed that upon the (last) spectrum license approval for RHYTHM FM in July 2019 (East London) RHYTHM FM and BEATFM commenced the process of applying for the financial drawdowns from their funders.*

[12] At the hearing of the matter Mr Mkhari answered a number of questions put to him by Members of the CCC. Whilst conceding BEAT FM's and RHYTHM FM's embarrassment at having taken up so much time, he also explained that the undertaking had been an enormous one – especially, also having included its applications for more frequency for both BEAT FM and, especially, RHYTHM FM. ICASA also had to, as prescribed, advertise the applications and, as was the case with East London, also hold a hearing, since *Algoa Radio* had filed an opposition to the East London application. From a publicity, financial and organisational perspective it is also, as put forward by Mr Mkhari, important to commence the service of both stations at the same time.

[13] Strictly speaking, Regulation 5 provides that two years would, even if an extension is granted, be the maximum period permitted. However, circumstances, especially in the present case with such a wide coverage area and with additional spectrum applications (which, understandably, took time to conclude, given the requirement of advertisement in the *Government Gazette* and a possible hearing of such an application by ICASA), the matter took much more time to conclude than what would have been expected by the Regulator in the normal course.

⁸ Section 16 of the Constitution

(1) Everyone has the right to freedom of expression, which includes:-

- (a) freedom of the press and other media;
- (b) *freedom to receive or impart information or ideas;(accent added)*

[14] However, the mere fact that the Council of ICASA, as advised, was prepared to grant the East London spectrum license on the 19th July 2019, whilst it knew that BEAT FM had not commenced broadcasting, demonstrates that it did not, given the circumstances, hold the omission to commence against BEAT FM. Six additional frequency licences had also been issued to BEAT FM on 13 March 2018. A spectrum license may, in any case, only be issued to a holder of a Broadcasting license – which was issued on 7 December 2015. Of course, a spectrum licence is not the licence referred to in regulation 5. However, it is undisputed that the Authority was aware that it had issued additional spectrum licences - without BEAT FM (and RHYTHM FM) having commenced broadcasting. Wider spectrum was integral to BEAT and RHYTHM FM's strategic broadcasting plan, so that more communities could be reached and that broadcasts should commence on the same day.

[15] The revocation referred to in regulation 11 is, in any case, not supported by the ICASA Act which, of course, overrides Regulations which are in conflict with it. According to the ICASA Act a *broadcasting* licence may only be *suspended* for a month, after previous frequent findings against it by the CCC as confirmed by Council.⁹ And before that may take place, the procedure in terms of section 17B of the ICASA Act must be followed – as is, presently, the case.

ADVICE TO COUNCIL

[16] Whatever the alleviating or aggravating circumstances are, it is now imperative to advise an order to Council that BEAT FM must commence broadcasting. Mr Mkhari put forward that BEAT FM (and RHYTHM FM) needed 8 months from the date that the order of Council is issued - the reference to the

⁹ See section 17E(2)(d) – footnote 9.

CCC having created uncertainty amongst investors and BEAT FM's management. The CCA's view was that 8 months would be too lengthy.

[17] Section 17E(2) of the ICASA Act provides as follows:

- (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
 - (a) direct the licensee to desist from any further contravention;
 - (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
 - (c) **direct the licensee to take such remedial or other steps [not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee; (Emphasis added)**
 - (d) where the licensee has **repeatedly** been found guilty of **material violations** -
 - (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, **subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or**
 - (ii) amend or revoke his or her licence; and
 - (e) direct the licensee to comply with any settlement .

[18] A suspension of the licence would, of course, not be supported by subparagraph (d) since *BEAT FM* has a clean record in the sense that it has not **repeatedly (or ever) been found guilty by ICASA of material violations.**

[19] Mention was also made by Mr Pierce, acting for BEAT FM, that a fine could be imposed. However, once again: a fine may only be imposed if prescribed. No such fine is prescribed for commencing late. In fact, the sanction, according to the Regulations, is that the licence would fall away. *This would be in conflict with section 17E(2)(d) of the ICASA Act, which has priority above Regulations.*

Advice to the Council of ICASA

[20] What would be fitting in the circumstances is to advise Council to issue an order in terms of subsection 17E(2)(c):

- (c) direct the licensee to take such remedial or other steps not¹⁰ in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

The representatives of ICASA and Mr Pierce, appearing for BEAT FM, were in agreement that Council should be advised to issue the following order in terms of the advice in terms of section 17E(2)(c) of the ICASA Act. BEAT FM put forward eight months. However, the CCA argued that a term of 8 months would be too lengthy. The CCC decided that 180 days (which would include Saturdays, Sundays and public holidays) would be reasonable. The ECA provides that “days” means working days unless otherwise specified. The CCC has decided that given the lengthy period which has already gone by, it would specify that Saturdays, Sundays and public holidays are included as “days”.

The advice to Council is thus to issue the following order:

1. BEAT FM must commence broadcasting at the latest 180 days (including Saturdays, Sundays and public holidays, but excluding any COVID 19 Phase 4 Lockdown period) from the day after the issue of this order.

[2] However, the Council of ICASA, on written application, may grant it more time based on orders or regulations issued in terms of the Disaster Management Act 57 of 2002 or operational reasons beyond its control, which made or are likely to make it objectively impossible to abide by the 180 days granted to commence broadcasting. Procedures by SENTECH may, in fact, lead to more time becoming necessary.

[3] Any application for more time, must state detailed reasons confirmed under oath as to why as a result of the said Act or Regulations or orders in terms

¹⁰ The word “not” is added to the section. There is legal authority that this may be done where a Legislative omission is obvious.

thereof or operational reasons beyond its control it was or will be impossible to comply with the 180 days order.

Such application must reach Council of ICASA at the latest twenty one days (including Saturdays, Sundays and public holidays) before the term of 180 days expires, unless exceptional circumstances, as stated in detail and under oath by the broadcaster, make it impossible to comply with the 21 days. BEAT FM may be called by Council to explain the application further in the presence of a representative of the CCA at ICASA.

[4] To order BEAT FM to inform, at least fourteen days (which include Saturdays, Sundays and Public holidays) before becoming operational, the CCA Manager per e-mail on which date BEATFM will be operational and provide the Manager within seven working days with an electronic copy of the first or second 24 hours of broadcast and also confirm that all frequencies are operational.¹¹

[5] To order that the electronic copy referred to in paragraph 4 must be confirmed by way of an affidavit duly signed by the Manager of the broadcaster and duly commissioned by a Commissioner of Oaths.

IMPLEMENTATION PLAN FOR BEATFM AND RHYTHM FM.

[6] That Council orders the Respondents, BEAT FM and RHYTHM FM, to file a combined and detailed Plan of Action as to how they plan to give effect to the order to be on air within a maximum of 180 days as set out above.

This detailed plan must reach the Manager of the CCA within 30 working days from the day after the above order is issued by Council.

The said plan must be updated as to performance every thirty working days thereafter with a final report fourteen days before launching.

The implementation plan must be undertaken in the context of the Complaints and Compliance Committee's recommendation to the ICASA COUNCIL that requires BEAT FM and RHYTHM FM to remedy their omission to abide by the term set to commence broadcasting in the 2010 Standard Regulations as amended in 2016, within 180 days (as defined above with possible exceptions with agreement by Council)

The implementation plan is required on the understanding that the additional spectrum applied for by the Respondents and approved by the Authority must enable the parties to launch full Sound Broadcasting Services for both

¹¹ Of course, ICASA Regulations, in any case, require that electronic copies be kept of broadcasts for a term as prescribed.

BEATFM and RHYTHM FM within a maximum of 180 days (as defined, with possible exceptions, above) from the day after the issue of this judgment by the Council of ICASA.

THE PLAN MUST CLEARLY REFLECT THE FOLLOWING:

- Objectives in line with the terms and conditions of the Respondents' licences
- Target dates (i.e. start and completion dates)
- Clear delineation of important milestones, including but not limited to the installation of equipment by Sentech, finalisation of equipment testing and dry runs.
- Commitment to and allocating adequate time for taking timeous corrective action for any project disruptions that may occur during implementation.



**JCW VAN ROOYEN SC
CHAIRPERSON OF THE CCC**

24 April 2020