

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

7 November 2019 and 23 January 2020

CASE NR: 351 /2019

In a matter referred by

**COMPLAINTS AND COMPLIANCE AFFAIRS ICASA**

**RE**

**CLASSIC FM**

**RESPONDENT**

Committee : Prof JCW van Rooyen SC (Chairperson)

Councillor Dimakatso Qocha

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Dr Jacob Medupe

Mr Jack Tlokana

For the CCA: Attorney Hope Majatladi Chaane

For the Respondent: Jerome Wilson SC

From the Coordinator's Office: Ms Meera Lalla and with her Mr Siyakha Plaaty

Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

JCW van Rooyen

[1]The Complaints and Compliance Affairs Division at ICASA referred ("CCA") in

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<sup>1</sup> 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 subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division 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 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.

terms of section 17B of the ICASA Act 2000, a matter to the Complaints and Compliance Committee to determine whether section 65(2) of the Electronic Communications Act has not been contravened by Classic FM (Pty), Ltd a broadcasting licensee. The section provides as follows:

**65. Limitations on control of commercial broadcasting services**

- (2) No person may -
  - (a) be in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service;
  - (b) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than two commercial broadcasting service licences in the FM sound broadcasting service
  - (c) be in a position to exercise control over two commercial broadcasting service licences in the FM sound broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting licence in the FM sound broadcasting service.
- (3) A person referred to in subsection (2) must not be in a position to control two commercial broadcasting service licences in the FM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.

[2] Mr *Chaane*, acting for the CCA, argued that Classic FM has contravened section 65(2) of the Electronic Communications Act 36 of 2005 (“ECA”) by virtue of the fact that African Media Entertainment Ltd (“AME”) has acquired 45.9% of the shares in Classic FM. The CCA alleges that section 65(2) has been breached on the grounds that, as a result of the aforesaid share acquisition, AME is in a position to exercise control over Classic FM’s commercial broadcasting service licence in circumstances where AME already exercises control over two other such licences (OFM and Algoa FM).

[3]The CCA’s allegation that AME is in a position to exercise control over Classic FM’s FM broadcasting licence is in turn based on the contention that the meaning of “control” in section 65(2) of the ECA is the same as the percentage stated in section 66(5) of the ECA, namely a 20% shareholding in a licence.

## **THE FACTS**

[4]Classic FM is a licensee that holds an Individual Commercial Sound Broadcasting Service license and Radio Frequency Spectrum license for the

provision of sound broadcasting services in and around Johannesburg. On 22 January 2018 and 31 May 2018, Classic FM provided ICASA with a notification advising it that on 15 December 2017, an entity called Africa Media Entertainment (“AME”), had acquired shares previously held by Boitshepo Investment (Pty) Ltd and that AME has direct shareholding of 7,85% in the respondent. In essence Boitshepo is no longer one of its shareholders and the shareholding of AME has now increased to 45,9 %.

[5] Classic FM has the following shareholders: Huntrex 144 (Pty) Ltd – 51,91%; Golden Pond Trading 183 (Pty) Ltd – 25,15%; Ingoma Trust – 15,09%; and AME – 7,85%.

[6] Before AME acquired the 7,85% shareholding held by Boitshepo, it held 25,4% indirect shareholding through acquisition of shareholding in Huntrex and 12,6% indirect shareholding through acquisition of shareholding in Golden Pond. This essentially means, as argued by Mr *Chaane*, that AME holds 45,9% shareholding in the respondent. Over and above AME’s shareholding of 45,9% in the respondent, AME further holds shares in the following commercial sound broadcasting services: 70.1% shareholding in OFM; and 80% shareholding in Algoa FM.

[7] Classic FM’s licenses were due to expire on 16 December 2018 and as a result, in June 2018, Classic FM filed an application for renewal of its licenses. It is in the midst of the application for renewal of these licenses, that the CCA noted the alleged contravention of section 65(2) of the ECA.

[8] The parties exchanged numerous letters in an attempt to resolve the matter, but agreement on the matter could not be reached. The reason for this was that Classic FM denies that section 65(2) of the ECA has been contravened, whereas the CCA is firm in its position that the AME has and continues to contravene section 65 (2) of the ECA.

[9] In view of the aforementioned dispute, the CCA referred the matter to the CCC on grounds which are set out below. And, if a contravention is found by the CCC, Council would then be advised by the CCC to issue a finding that section 65(2) had been contravened and an appropriate order in terms of section 17E of the ICASA Act be made.

[10] It was argued that for the following reasons AME is in a position to exercise control over more than two commercial broadcasting service licenses in the FM sound broadcasting service.

(a)The CCA noted that AME's consolidated provisional financial statement for 2018, contained in AME's annual report, that AME acquired a direct shareholding of 7.85% in the respondent; AME acquired shareholding in shareholders holding 77,6% shareholding in the respondent; and the above brings AME to a 45,9 % shareholding in the respondent.

(b)It was submitted that as a result of the said acquisition AME was placed in a position to exercise control of more than two commercial broadcasting service licenses in the FM sounding broadcasting service. Thus, this transaction placed AME in a position to exercise control over: Classic FM – 45,9%;OFM – 70,1%; and Algoa FM – 80%.Itwas argued that the 20% limit which applies to section 66(5) also applies in this matter in terms of section 64. Section 66 (5) of the ECA (which deals with cross-media ownership according to its heading) provides that:

- (5) No person referred to in subsection (4) may be in a position to control two commercial broadcasting service licences in the AM sound broadcasting service, which either have the same licence areas or substantially overlapping licence areas.

It was submitted that even though the ECA does not in its introductory provisions define 'control' or what the position to exercise control' is, section 66 (5) puts out a clear and unambiguous definition of what constitutes control and that this also applies to section 64. Thus, it was contended, any argument which seeks to convince the CCC to read any (limiting) words into section 66(5) cannot stand. It would, according to the CCA's legal representative, seem that the Respondent argues that there is a difference between direct and indirect shareholding. This, it was argued, is not provided for in the ECA and in particular in section 66(5) itself. Owing to the acquisition by AME of shareholding in the respondent and the undisputed facts that AME has shareholding in two other commercial broadcasting licenses in the FM sound broadcasting services, it cannot be disputed that this amounts to a contravention of the provisions of section 65 (2).

(c)It was also argued that the Natal High Court's judgment in ***KZN Talk Radio (Pty) Ltd v Independent Communications Authority of South Africa and Another***,<sup>2</sup> rejected *KZN Talks* application for a license on the basis that *Primedia*, which is a shareholder in *KZN Talks*, already controls four broadcasting service licenses in South Africa. Thus, if ICASA would award the Durban radio license, *KZN Talks* would be in breach of the provisions of section

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<sup>2</sup> Unreported judgment, (41672/12) [2014] ZAGPJHC 396 (5 August 2014).

65(2) (a) of the ECA.<sup>3</sup> *KZN Talks* contended amongst other things, that ICASA was incorrect to base its decision on the view that a 20% shareholding constitutes control for the purposes of section 65 of the ECA.<sup>4</sup> Instead ICASA ought to have proceeded on the basis of the common law definition of control, absent any specific provisions in the shareholders agreement, which may have resulted in control being at a lower percentage than 50%.<sup>5</sup>

The Court held that the concept of ‘control’ is important to an understanding and application of the limitations that are imposed by section 65 of the ECA. That being said, neither section 65 nor section 1 of the ECA defines what control is. The Court held that the question that had to be determined was whether the deeming provision contained in section 66 (5) of the ECA is applicable to section 65. *KZN Talks* contended that the deeming provision was not applicable to section 65.<sup>6</sup>

The Court held that the deeming provision in section 66 (5) applies to section 65 (2) and as such control as utilized in the provisions of section 65 (2) should be interpreted to include a 20 % shareholding.<sup>7</sup> It was held that *KZN Talks* had failed to convince the Court that ICASA committed an error of law in its interpretation of section 66 (5) of the ECA.<sup>8</sup> [This judgment was set aside on appeal, as will be pointed out later]

[11] THE CCC SHOULD THUS, IN THE PRESENT MATTER, IT WAS SUBMITTED, FIND THAT AME HAS AN OWNERSHIP INTEREST IN THE FOLLOWING COMMERCIALY SOUND BROADCASTING SERVICES - 70.1% SHAREHOLDING IN OFM;80% SHAREHOLDING IN ALGOA FM; AND 45,9 % IN CLASSIC. CLASSIC IS THUS IN CONTRAVENTION OF SECTION 65 (2) OF THE ECA. CLASSIC SHOULD THUS BE DIRECTED TO REMEDY THE BREACH OF SECTION 65 (2) OF THE ECA; AND THUS TO DESIST FROM ANY FURTHER CONTRAVENTION OF THE ECA; AND PAY A FINE DEEMED APPROPRIATE UNDER CIRCUMSTANCES.

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<sup>3</sup> *KZN Talk Radio (Pty) Limited v Independent Communications Authority of South Africa*, at para 12.

<sup>4</sup> *Ibid* at para 11.

<sup>5</sup> *Ibid* at para 11.

<sup>6</sup> *Ibid* at para 24.

<sup>7</sup> *Ibid* at para 32.

<sup>8</sup> *Ibid* at para 33.

## CLASSIC FM ARGUMENT

[12] Classic FM submitted that the CCA's claim that section 65 of the ECA has been contravened is unfounded for two reasons:

(a) First, the definition of control in section 66(5) of the ECA is not applicable to section 65(2) of the ECA. "Control" for purposes of section 65(2) is not defined, and therefore, the argument falls to be determined on ordinary interpretational grounds. Further, that having regard to section 65(2) in the context of the ECA as a whole and the purposes thereof, "control" in section 65(2) means the *de iure* power to determine, or the *de facto* power to materially influence, the policy of the licensee in the manner of a person who is able to exercise the majority of the voting rights in a company; or to vote (or control the voting of) a majority of votes that may be cast at a general meeting of the company; or to appoint (or veto the appointment of) a majority of the directors of a company.

(b) Second, even if the definition of control in section 66(5) were applicable to section 65(2) of the ECA, the 20% shareholding therein refers to a holding of shares in the relevant licensee, and not a mere financial interest in such licensee.

(c) It was further argued that there is no definition of control in section 65 of the ECA, nor is there a general definition of "control" in the definitions section of the ECA. Section 66(5) is a subsection of section 66 of the ECA, which, as its heading reflects, deals specifically with "*Limitations on cross-media control of commercial broadcasting licences*". Counsel argued that it is well-established that, where there is any ambiguity regarding the meaning of a particular statutory provision, regard may be had to the heading of the section in which that provision appears in order to determine its meaning. As noted by the Constitutional Court in *President of the Republic of South Africa v Hugo*, headings situate a provision within the general structure of the statute, indicating its framework, its anatomy and are a key to the interpretation of the sections ranged under them.<sup>9</sup>

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<sup>9</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para 12, including fn 13.

(d)The wording of section 66(5) is also tailored specifically for purposes of section 66(5), referring as it does to a commercial broadcasting licence “*in either the television broadcasting service or sound broadcasting service*”. This latter distinction, while relevant for purposes of the cross-media control provisions of section 66, it was argued, is not relevant for purposes of the general control provisions contained in section 65. As a result, the definition of control in section 66(5) does not “fit”, even grammatically, in the context of section 65(2) of the ECA.

(e) Further that if the Legislature had intended the definition of control in section 66(5) of the ECA to apply also to section 65, it would have inserted a similar provision to section 66(5) in section 65 of the ECA, or inserted a general definition of “control” to that effect in the definition section of the ECA.

[f]The above interpretation, it was argued, is also supported by the other control provisions contained in the ECA. If the definition of control in section 66(5) were applicable outside section 66 of the ECA, it would not only be applicable to section 65 but also to all the other control provisions of the Act. “Control” is referred to 68 times in the ECA. The definition of control in section 66(5) would make no sense if applied to all these references to control. In many instances, it is a clearly inappropriate definition, and in certain cases it would be nonsensical. Merely by way of example:

(1)In section 2(v) (control by person from a diverse range of communities in South Africa) and section 2(w) (control by South Africans), control would be limited to a 20% shareholding.

(2)In section 13(1) (and section 31(2A)) (control of a licence), the CCC held in *Neology*<sup>10</sup> that “*control*” means majority legal control (i.e. a shareholding of over 50% shareholding), and accordingly that a 45% shareholder did not exercise control of a licence for purposes of that

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<sup>10</sup> *In re Neology (Pty) Ltd* (Case no. 299/2018) dated 4 June 2019)

section even though it was common cause that the shareholder exercised *de facto* control over the licensee.<sup>11</sup>

(3) In 67(5)(b), in which a licensee is deemed to have “*significant market power*” if it, *inter alia*, has “*control of an essential facility*”, the definition of control in section 66(5) would clearly be inapposite.

For all of these reasons, the definition of control in section 66(5), it was argued, is not applicable to section 65(2) of the ECA, and the meaning of the latter section must instead be interpreted in accordance with the normal principles of statutory interpretation.

[g] The CCA has referred in its correspondence to the judgement of Francis J in the case of *KZN Talk Radio*,<sup>12</sup> in which the learned judge held that the definition of control in section 66(5) does apply to the concept of control in section 65(2). However, that interpretation is not binding on the CCC or ICASA for two reasons. First, the case was decided on another basis, and accordingly that interpretation does not form part of the ratio of the judgment. *Second, the judgement of Francis J was overturned on appeal by the Full Bench of the High Court.*<sup>13</sup>

#### *AME DOES NOT HAVE A 20% SHAREHOLDING IN CLASSIC FM*

[13] It was further argued that even if the definition of control in section 66(5) were (contrary to the submissions set out above) applicable to section 65(2) of the ECA, that would not, in this case, assist the CCA. This is so because section 66(5) refers to a 20% “*shareholding in a commercial broadcasting service licence*”, which must be interpreted, by virtue of its ordinary grammatical meaning, to mean a 20% shareholding in a commercial broadcasting service licensee. However, AME does not have a 20% shareholding in the licensee in this case, being Classic FM. AME only has a shareholding of 7.85% in Classic FM, as appears from Classic FM’s answering affidavit.

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<sup>11</sup> *Id*, at para 6.

<sup>12</sup> *KZN Talk Radio (Pty) Ltd v Independent Communications Authority of South Africa and another* (Case no. 41672/12) at paras 29-33.

<sup>13</sup> *KZN Talk Radio (Pty) Ltd v Independent Communications Authority of South Africa and another* (Case no. A5063/2015) dated 26 November 2016.



[14] It was argued that the basis on which the CCA has calculated what it, incorrectly, refers to as a 45.9% shareholding by AME in Classic FM is by simply adding up AME's shareholding of 7.85% and the indirect financial interest AME has in Classic FM through its shareholdings in Huntrex (Pty) Ltd and Golden Pond Trading 183 (Pty) Ltd. This approach, it was argued, is impermissible because it conflates the concepts of shareholding and financial interests. Had the legislature intended to give the term "*shareholding*" in section 66(5) the meaning of financial interest (or, in the phraseology of the CCA, "*indirect shareholding*"), it would have said so, as it did in section 64. In section 64, the legislature expressly distinguishes between the concepts of control, interests in voting shares and a "*financial interest*", the latter of which is defined in section 1 of the ECA. This indicates, it was argued, that the term "*shareholding*" in section 66(5) cannot mean financial interest (or "*indirect shareholding*"), and must bear its ordinary grammatical meaning of a holding of shares directly in the licensee. This interpretation is moreover supported by the evident reasoning underlying section 66(5), namely that a direct shareholding of 20% in a licensee is likely to afford a shareholder with a certain degree of control of the licensee. This inference is clearly not available if there is a mere financial interest (or "*indirect shareholding*") of 20% in a licensee. For example, if a company has an aggregate financial (or economic) interest of 20% in a licensee by virtue of a non-controlling shareholding in one or more shareholders of a licensee, that financial interest would not, in and of itself, reflect a voting interest of 20% in the licensee, or any other form of control over the licensee. This is also, it was argued, clear from the definition of "*financial interest*" itself in section 1 of the ECA, which must be an interest that gives a person "*the power to control the licensee*" or "*an effective say over the affairs of the licensee*". Therefore, even if a person has a financial interest of over 20% in a licensee, that is not deemed to vest that person with control of the licensee in terms of section 64(1)(b), unless that financial interest comes with one or both of the control elements set out in the definition of financial interest.

[15] As the CCC stated in *Caxton/ Multichoice* [per Prof Piet Delport as Acting Chair]: "*The mere fact that a large financial interest exists, whether held as shareholder/s as contended by Caxton or as creditors does not per se give 'control'. There must clearly be something additional such as an agreement,*

*undertaking or understanding linked to and based on the financial interest which confers control in the wide sense.... Without some connecting factor between 'financial interest' and 'control', section 65 cannot become operational."*

It is thus plain that AME's shareholding and financial interests cannot simply be added together in the way the CCA has sought to do for purposes of the 20% shareholding calculation referred to in section 66(5) of the ECA.

[16] If the CCA had wished to rely on the financial interests that AME has in Classic FM by virtue of its non-controlling shareholdings in Huntrex and Golden Pond, it would, as the CCC explained in *Caxton vs Multichoice*, have had to adduce evidence that such financial interests gave rise to control of Classic FM. However, the CCA has adduced no such evidence

[17]The CCC confirmed in *Neology* that the concept of control for purposes of accounting consolidation under the applicable accounting standards has no relevance to the concept of control in the ECA. The CCC therefore concluded in *Neology* that the shareholder did not control the licensee for purposes of section 13 of the ECA, notwithstanding that the shareholder controlled the licensee in terms of the applicable accounting standard and had on that basis consolidated the financial results of the licensee in its own financial results.

**[18]For all the above reasons, there is no basis for the CCA's complaint, and it was submitted that it should be dismissed.**

### **[19]FINDING BY THE CCC**

(1)The CCC has, substantially, quoted the argument by the legal representatives of both parties to demonstrate the debate on the issue before the CCC.

(2) *The CCC, however, agrees with Senior Counsel for Classic FM that the 20% limitation only applies to foreign ownership in terms of section 64 of the ECA. That limitation must, in any case, be approached as set out by the CCC in the Caxton<sup>14</sup> matter.*

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<sup>14</sup> See above.

(3) The CCC also finds that AME is not in a position to exercise control over Classic FM since it holds less than 50% of the shares. As pointed out in the *Caxton* matter, there must, in any case, be further evidence that *control* can be exercised, despite the percentage. Of course, if it were a 100% share, then that would be decisive, as also pointed out in the *Caxton* matter. However, that is clearly not the case in the present matter. At its most, the percentage is, in any case, under 50%.

(4) Although this point was not argued directly, it should be borne in mind that, except for legislation explicitly exempted in the Companies Act (which does not include the Electronic Communications Act) the definition of control, as set out in the *Companies Act*, applies in all other cases. Except for sections 64(2) and section 66 of the ECA, no percentage is mentioned as amounting to control in the ECA. The *Caxton* judgment of the CCC, in any case, applies to section 64 – effectively requiring *additional* evidence before control is found to be present – since, even section 64(2) must be interpreted, according to the *Caxton* judgment, as requiring evidence of *control*, despite the 20% requirement.

(5) “Control” must, in any case, be established as set out in the Companies Act. Section 5 of the Companies Act 2008 provides as follows:

## 5. General interpretation of Act

**(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation-**

(a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

**(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second-**

**(i) any applicable provisions of the-**

(aa) Auditing Profession Act;

(bb) Labour Relations Act, 1995 (Act No. 66 of 1995);

- (cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);
- (dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);
- (ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (ff) Financial Markets Act, 2012;
- (gg) Banks Act;
- (hh) Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003); or
- (ii) Section 8 of the National Payment System Act, 1998 (Act No. 78 of 1998).

***prevail*** in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30(8) or 49(4); (emphasis in italics added)

or

- (ii) ***the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4).***(emphasis in italics added)

**(6) The ECA, as appears from the above, is not exempted from the Companies Act. Thus section 2 of Companies Act applies to the present matter insofar as control is concerned. Section 2 of the Companies Act provides as follows in regard to control.**

## **2. Related and inter-related persons, and control**

(1) For all purposes of this Act-

- (a) ...

(b) ...

(c) a juristic person is related to another juristic person if-

(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);

(ii) either is a subsidiary of the other; or

(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(2) For the purpose of subsection (1), a person **controls** a juristic person, or its business, if-

(a) in the case of a juristic person that is a **company**-

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section\_3(1)(a);or

(ii) that first person together with any related or inter-related person, is-

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

(b) ...

(c) ...

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who,

in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

(3) ...

**(7) AME does not qualify under any of the above requirements:**

**(a) Classic FM is not a subsidiary of AME;**

**(b) AME does not exercise control in terms of (ii) (aa) or (ii) (bb);  
and**

**(c) AME does not have the ability to materially influence the policy of the Classic FM in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).**

The finding on the merits is accordingly that AME does not control Classic FM and that the ECA has not been contravened.



JCW VAN ROOYEN SC

The Members agreed

23 January 2020