



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

Date heard: 25 September 2020

CASE NR: 365/2019

The matter between:

**THE COMPLAINTS AND COMPLIANCE AFFAIRS DIVISION OF ICASA *and***

**COFIFI FM RADIO**

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: Mr Gumani Malebusha and Ms Sameera Mota. On behalf of Cofifi FM: Ms Nadia Steyn from BDK Attorneys. Coordinator of the CCC: Ms Lindisa Mabulu and, with her, Ms Xola Mantshintshi

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### JUDGMENT

JCW van Rooyen [1] Cofifi FM, a Sound Broadcasting licensee, was referred to

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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 referred to Council for noting and 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, the Broadcast Act 1999, 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 and confirmed by Council 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 a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued.

the Complaints and Compliance Committee (“CCC”) at the Independent Communications Authority of South Africa (“ICASA”) on the instruction of the Acting General Manager of the Compliance and Consumer Affairs Division (“CCA”) at ICASA.

[2] The listener who lodged his complaint with the CCA is a Mr Michael Kahn who alleged that a presenter, Mr Lionel Miles, on Cofifi FM had made derogatory remarks about Roman Catholics on Tuesday 20 November 2018 between 08:00 and 12:00. These remarks would amount to a contravention of the Broadcasting Code 2009 if the remarks amounted to hate speech, as defined in the Code – which accords with section 16(2)(c)<sup>2</sup> of the Constitution of the RSA.

[3]The Office of the Coordinator of the CCC requested the radio station to provide it with a copy of the broadcast in which the alleged words were used. No copy was, however, available since the recording device of the station was, after the broadcast, destroyed during a thunderstorm, according to the broadcaster. This was, at the request of the CCC, confirmed by way of an affidavit by the Station Manager and the Manager of the electrical shop where it went for repair. Such recording is, of course, most important for purposes of complaints against a radio station, not only insofar as content is concerned, but also as evidence of its duty to broadcast in terms of its licence.

[4] The Broadcasting Code, which was published as Regulations by ICASA in 2009, sets the rules subject to which broadcasters are judged by the CCC when a complaint is received against a broadcaster as to the *content* of a broadcast. The CCC may only consider a complaint *after* a broadcast. That there would be no censorship of broadcasts in South Africa, was already clearly stated in the IBA Act 1994 and repeated in section 53(2) of the Electronic Communications Act 2005. This approach also conforms with the guarantee of freedom of expression in section 16 of the Constitution of the RSA. All broadcasters fall under section 53(1) of the ECA and under the jurisdiction of the CCC, if a contravention of the said section is alleged by Complaints and Compliance Affairs (ICASA).

[5] Section 53(1) of the Electronic Communications Act provides as follows:

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<sup>2</sup> The right in subsection (1)[freedom of expression) does not extend to:-

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) **advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. (accent added)**

### 53. Record of programmes broadcast by broadcasting service licensees

- (1) A broadcasting service licensee must -
  - (a) on demand by the Authority, produce to the Authority any recording of every programme broadcast in the course of his or her broadcasting service for examination or reproduction, within 60 days from the date of broadcast;
  - (b) on demand of the Complaints and Compliance Committee, produce to the Complaints and Compliance Committee any script or transcript of a programme after the broadcast of the programme.

[6] The duty to record broadcasts applies to all broadcasters. A recording in modern parlance is an electronic recording which must on a continuous basis record what is broadcast. The CCC has had an instance where impossibility for a day was accepted as a defence, while part of a radio station was being moved.<sup>3</sup> However, the clear legal expectation is that a broadcaster *must* ensure that the recording takes place continuously and that it is kept for sixty days. Since this provision is in the *Act*, it cannot be overridden by Regulations

[7] The defence of Cofifi for not providing a copy of the broadcast was that a thunderstorm had destroyed its electronic recording system, which also held records of past broadcasts. The copies of the relevant broadcast(s) were also destroyed. This was confirmed by way of affidavits by the station manager and the company which repaired the mechanism.

[8] There was no reason, in law, not to accept the defence.

### SECOND MATTER

[9] The second matter dealt with a broadcast or broadcasts by the station - a presenter of which was said to have made remarks derogatory of Roman Catholics since, during a funeral where he was present, he was not permitted to partake in Communion since he was not a Roman Catholic. His view was that as a confirmed Anglican he was entitled to partake in Communion in any Christian Church.

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<sup>3</sup> *Nowmedia v SAPO* (Case 126/2015); *Gassner v Minister of Law and Order and Others* 1995 (1) SA 322 (C); and CCC case *In Re Nkomazi FM* 205 /2016.

[10] The complaint was withdrawn by the representative of the CCA. The withdrawal fell within the CCA's powers, since the complaint was filed with it. No reasons were provided for this withdrawal. However, given the fact that the CCA was the *dominus litis*, it had the right to do so.<sup>4</sup>

#### **FINDING**

[11] The following finding was made by the CCC:

(a) The first Complaint is dismissed.

(b) Since the second matter was withdrawn, no decision was reached on it and it was removed from the Roll.



JCW van Rooyen SC

Chairperson

5 November 2020

The Members agreed with the judgment

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<sup>4</sup> *Dominus litis* translated :in charge of the complaint.