

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 16 August 2019

CASE NO: 327/2019

DIEPSLOOT SERVICE DELIVERY EAGLE WATCH

COMPLAINANT

DIEPSLOOT COMMUNITY RADIO

RESPONDENT

TRIBUNAL

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 Complainant: Mr Samuel Seale; On behalf of the Respondent: Mr B Maluleke (Station Manager); from ICASA: Mr Thabo Ndhlovu (Manager Licensing); From the Coordinator's Office: Mr Thamsanqa Mtolo and Mr Siyakha Plaatji. Coordinator: Ms Lindisa Mabulu

JCW van Rooyen

[1] The complaint in this matter, filed by Diepsloot Service Delivery Eagle Watch, concerns alleged contraventions by the Respondent Community Broadcaster of its licence conditions and the Regulations Regarding Community Broadcasters 2019.

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 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 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 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 by the Complaints and Compliance Committee's Coordinator. Where a complaint is not upheld, the finding is also referred to Council.

COMPLAINT

[2] The complaint reads as follows:²

We have been approached with many complaints from the community structures and individuals, most of whom were or are the staff.

Descriptions: UNOFFICIAL TRUST DEED, means the unsigned one and the ORIGINAL TRUST DEED, means the document signed and stamped by the Master of High Court.

We are compiling this letter to request the CCC's intervention in the issues that are below:

- According to the station's trust deed, of which there are two, one being submitted to Icasa which is not official or declared by the Master of the High Court and the other being official, whereby the members are not the same on both documents, where it raised a concern of how was the other trust deed made without original members stating their unavailability to continue with the project.
- Many operational duties were faced by the station manager alone, whereby the Board couldn't agree on releasing what was needed by the manager of the station: either funds or approval of documentation.
- On the unofficial trust deed and the original, both financial manager and station manager have signatory powers, though in practice it's not as such: 6.1 and 6.4 of the original trust deed document which correlate with the unsigned trust deed on 7.1, 7.4 and 7.6(hand edited).On the seventh part number 7.2.6 it is not in existence, the Board hasn't engaged or liaised with the community in the years the station has existed. 7.2.7 hasn't been taken seriously.To this date the station has only one policy which is a general labour policy in conjunction with BCEA.Till this day the news department doesn't have an editorial policy, code of conduct doesn't exist...The management committee is non-existent because the station manager claims that he is the only paramount decider.
- The Board has failed to oversee the governance of DCRS in terms of policy making and amending: this includes financial policies as it is outlined by the trust deed on the unofficial document reads No 6 in totality and on the original document 7.2.1 to 7.2.8.
- The station has been in operation for 4 years this year and its objectives haven't been met as outlined on No 5 of the unofficial trust deed and No 4 of the original trust deed. 5.2 one is not in practice because many individuals have been turned away wanting to participate in the development of the station. In fact the whole of No 5 is not in

² The undersigned took the liberty, with the utmost respect, of correcting most grammatical errors in the documentation filed.

practice.5.4 is completely ignored because the station manager has allowed his personal issues with institutions heads to deprive the station to grow. 5.6 is also meaningless because access is preferential. We have received numerous unsettled community members saying they can't access the station because its location is not shared and walk-ins are only for friends and those close to the staff members. In a nut shell the station is operated like a private entity.

- The trust must have current account bank account, but this is not what is happening in the DCRS because the account is a *stokvel* club account, which is in contravention with their own rules. The No 11 the income is kept not ploughed back in the community for the development.
- On the No 12 the auditor is appointed but he can't proceed with the work as lot of information is missing, like receipts or proof of purchase of consumables and other finance is used without any support of what it had bought. The only closed books are of 2014 to 2016 which again it is closed with a gap of unsupported documentation. For the auditor to close the book he needs the signed off resolution from the Board. Till this day that resolution hasn't been furnished. The auditor hasn't accounted to the Master of the High Court ever since his appointment.
- The management team requested numerous meetings with the Board, to ask clarity on their mandate. They ended up blaming each other. At last the chair failed to take or initiate directive, and he threw his hands up. That to us concluded that the Board is worlds apart and it needs to renew or be disbanded as outlined by the trust deed No 18 of the unofficial trust deed and original trust deed No 17.
- The original trust, if it is not in use as now, we have received unofficial, there was supposed to be a resolution or agreement by the members of the original trust deed that they amend the new trust deed which we stated it as unofficial. As outlined on No 21, now we have two trust deeds with two different members. This on its own proves the ignorance of the Board members currently sitting on the unofficial trust deed. The Master of the High court doesn't even recognize them.

ON THE CLASS BROADCASTING SERVICE LICENSE GRANTED AND ISSUED TO DCRS

The station hasn't held any public meetings with the community ever since the first license was issued, according to the license No 4 (community) 4.2.1, and if the meeting never happened and on the 4.2.2 and 4.2.3 becomes problematic, we ask ourselves how does the station operate without abiding by the broadcasting rules and is ICASA aware of these issues. We were told by one of the staff of Sloop fm that he tried to inquire about any contraventions that the station has been involved in. As in 2016 the station was in contravention with location and it was charged. Now ever since the staff member asked Mr Maano as it was said that he is the one responsible for the station in terms of broadcasting.

And again in terms of news we only hear them sometimes only on one language Sepedi. Please if only the station was being operated according to the trust deed this wouldn't have happened...

We need to know what the commission is going to do about this since it is ICASA that oversees the broadcasting side of radios in SA.

COORDINATOR OF THE CCC'S REACTION TO THE COMPLAINT

[3] Upon having received the above complaint, the Office of the CCC Coordinator required the following from the Respondent Radio Station:

(a) Delivery of a detailed response to the Office of the CCC within fifteen days of receipt hereof, being Tuesday 25 June 2019. (b) Furthermore, the Board of Trustees of Sloop FM and the Station Manager are requested to attach the following supporting documents to the aforementioned response: The Board of Trustees' Resolution to appoint a new Board of Trustees and a signed copy of the new Deed of Trust; Bank Account information with the names of the bank account signatories; Audited Annual Financial statements of Sloop FM for the following financial years (2014/2015, 2015/2016, 2016/2017 and 2017/2018); Copy of minutes of the Annual General Meetings and attendance registers of meetings held in the 2014/2015, 2015/2016, 2016/2017 and 2017/2018 financial years; A Report on the distribution of surplus funds for the purposes of community development; Corporate governance and operational policies which must include the programming policy; and Comprehensive information of members of the Board of Trustees. In terms of Regulation 4(2) of the regulations governing aspects of the procedures of the CCC of ICASA, the Complainant will then be given 10 days to reply to your response to the original complaint.

RESPONSE FROM THE RADIO STATION

[4] The Response which was received from the Radio Station sets out numerous problems which Diepsloot has and has had and reads as follows:

1. Background

The Community Radio Station trust was established in 2000 by members of the community who at the time were organised by Mr Sila Ramohlola. Mr Ramohlola came up with a concept which he believed, at the time, that the community needed a tool to communicate developmental matters. The mobilisation around this project

started in 1997 where Mr Ramohlola was trying to sell the idea to different people who really, at that time, most of the leaders did not take serious. He then made an appointment with Mr Sekutu towards the end of 1997, who at that time was managing the Adult Basic Education and Training Centre, to sell the concept. Mr Sekutu invited teachers from Muzomuhle Primary school to be part of that meeting and they attended without fail. Agreement was made to visit existing Radio Stations for benchmarking and understanding of what it takes to have such a project.

Alex Radio Station was the first to be visited and the management of the Alex FM agreed that they would help with everything that is needed to get started. They advised that we must recruit people with different skills and knowledge if we want the project to succeed. At that time Alex FM was facing serious challenges and lost their licence, which made even pursuing Diepsloot project difficult. The organising team was also introduced to the forum that was organising Community Radio Stations called National Community Radio Station Forum (NCRF). We have also affiliated with the forum which assisted the organisers with important information to organise towards registering the community station. The team was then advised on the procedure to register the station, which was first to register as either a public company, Trust or non-profit organisation. We chose to register as a trust; it presented a lot of opportunities. It was also advantageous because we could register a non-profit organisation under the Trust. We wanted to have multiple projects under the Trust, the first being the Radio Station. We approached different professionals, including Marrium Mashishi, who was a practising attorney at the time to assist in registering the Trust and to be a Board member at the same time. We further approached Mr Themba who was a businessman in the community to be a Board member and he accepted. Alex FM agreed to second one of their Board members for mentoring purposes. We further approached the Methodist Church to second their pastor to the Board and they assisted. The Methodist Church was the only church with registered address in Diepsloot at that time.

2. Aims and objective of the station

- To enable the people of Diepsloot to speak and to listen to one another.
- To build a spirit and practise to participatory Community Radio by involving as many individuals and organisations as they are willing to participate in the station.

- To constitute a non-profit Community Trust which will manage and operate as a Radio Station in Diepsloot and other neighbouring areas.
- To be a non-partisan promoter of social justice and democracy, free of racism.
- To produce quality Radio programmes that will unify, enrich, liberate, educate, entertain and that will build a good relationship amongst the people of Diepsloot and neighbouring areas.
- To afford everyone access to the station.
- Engage the private sector to influence and partner with other stakeholders in promoting developmental and investment activities
- Job creation.
- Engage educational institutions in improving the level of education in our community.
- Promote gender equality.

3. Progress since the registration of the station.

The first task of the Board was to organise the community to collect 500 or more signatures as proof that the community supports the initiative of having the Radio station and supporting letters from non-political organisations that exist in the community. The Board was expected to have supporting letters from councillors of the ward that the radio station will cover as proof that the municipality do not have an objection to the radio station concept. All that was achieved through Iterele Zenzele school kids assisting in collecting such signatures. The Board was told not to submit the application to ICASA between the year 2000 and 2009, since at that time there was limited space for broadcasting.

The station then submitted the application to MDDA for funding so that they can secure equipment while waiting for the opportunity of licence application to open. MDDA advised that the application will be considered once all community Radio Stations that are on air are funded, since they had limited funds at that time. We were also provided with a building within the community to use for the Radio station, but that was since taken away from the station when certain leaders started to want the building, even if there was a signed contract between the station and the owners of the building.

MDDA approved funding in 2016, August but deposited the money in December 2016. The Board signed the agreement which was clearly explained on how to use those

funds as per our funding requests. What was more important was the fact that the money was ring-fenced to assist the station on accountability for usage of the funding. The instruction was that a separate account must be opened for those funds. Part of the money was to pay staff of the station, including paying stipend to the presenters. It was only four presenters who were to benefit. The Board requested the chairperson and the station manager to present the financial standing of the station. The idea was to approve budget for stipend to be paid to all presenters, who were 19 in number, including those to be paid through the funding from MDDA. The Board further tasked Mr Sekutu and Mr Maseko to secure a meeting with the presenters to communicate such approach.

The meeting between two Board members did not end well because the station manager misled the presenters that the Board wanted to interfere with the running of the station and further wanted to use the money for their own interest. The two Board members were subsequently locked in the station, but then the police intervened.

4. Licence application

The station handed in the application to be on air between the year 2010 and 2012 and we were unsuccessful because of technicalities. There was a payment made to ICASA since applying was not free. We then lodged a second application on 25 September with ICASA for the provision of community sound broadcasting services to Sloot FM. We were notified then that what we were given is only a broadcasting service licence and therefore required to contact Mr Monde Mbanga in their Spectrum department to obtain a Spectrum licence. There were therefore two licences issued by ICASA to the station for broadcasting with two different expiry dates. When we were launching this application, Silas Ramohlola was the person assisting the Trust, as we entrusted day to day operation to him. Bongani was requested to also coordinate some of the other activities like enquiring what is needed and collect them where Mr Ramohlola was not present. Bongani was recruited and introduced to the Board by Mr Ramohlola.

5. Board of Trustees

All Board members who agreed to be part of the Trustees for registering the station made it clear from the very beginning that they must not be expected to run around on the registration of the station, but only give their documents to the organising team because they believed the project was for a good cause. Mr Ramohlola will visit any place that was recommended to help in achieving the dream, where they need a

Board member, they will inform Mr Sekutu to avail himself. The Trust also appointed Ms Molepo as the secretary to assist in typing and organising any document that the station is expected to present to any institution. This was before we got Bongani into the project because she since passed away. Mr Themba was another Board member who also passed away.

When application was made the Board was expected to meet and sign certain documents but it was difficult to find some Board members and a decision was made to institute temporary Board members for the acquisition of the radio licences. We could only do that by requesting them to hand in resignation letters because the registration dictates that we cannot have anyone acting on behalf of the Board without the Board's approval.

It was then proposed that we approach organisations that assisted the Board with letters to provide names to be added as interim Board members with the understanding that they are community activists and therefore will be available from time to time. [The names of several organisations are then set out and they put names forward – Chair] All these Board members were approached with the spirit that once the Board secured a licence, they will then be formalised as Board members to appear on the Trust Deed through the Master of the High Court.

The interim Board members started to experience problems when requesting the chairperson for the financial report so that they will decide on how to provide the presenters with stipends. The chairperson was lost from the activities of the station until available Board members decided to request the appointed Audit Company of the station to audit and perform a forensic investigation into the coffers of the station. We then received the report from the Auditors and were informed that there was money withdrawn from the station's account, which was unaccounted for. We then checked which of the four signatories have withdrawn money without the approval of the Board and used it. It was found that it was the Chair, Mr Senosi and Ms Mashego. We requested them to come to the Board meeting and they could not until they ambushed one of the Board members with part of the presenters to demand that they go with them to withdraw money from the other account. The money was from MDDA, which was ring-fenced.

6. Operation of the Board

The Board members are expected to hold meetings three times a year and are not the management of the station. They have the powers to recruit and appoint management of the station characterised as follows: Station Manager, Programme Manager, Operational Manager and the Financial Manager. Since the acquisition of the Licence, the Board met its constitutional mandate of meeting three times per year and at times they met more than three times because of some urgent pressing issues the Trust Deed allows. The interim Board agreed to appoint a Station and Programme manager to operate the day-to-day running of the station, until we have funds to appoint all management positions on a five year full time contract, once sustainable. It was agreed that Board members will have to do those functions and Ms Hlophe was requested to act as full time Station Manager, Mr Senosi to take responsibility of finances on a part time basis and Mr Sekutu to assist with marketing for the time being on a part time basis. After that decision was made, Mr Bongani Maluleke felt aggrieved and believed that he deserved to be given a chance to play a role as a Station Manager. He therefore approached Mr Ramohlola to register a concern and afterwards went to Mr Sekutu with the same concern for them to approach the Board and requested that he be given a chance. The two members approached, met and agreed that we will register it with the Board and try to convince them to agree in pairing him with Ms Karabo Hlophe since that will be done voluntarily and that will also assist Ms Hlophe whenever she is unable to be at the station due to business activities. The Board was approached and agreed to the proposal. This was done for the sole purpose of good faith and making the Radio Station project work. The Board had external stakeholders who were assisting the station and at time-to-time have meetings with them.

7. External stakeholders

The station had professor Harbor from Wits University and Jennifer from an NGO to assist in both securing funds and mentoring on matters of media who played a pivotal role in that space. Among the achievements in having them on Board was to secure funds to train presenters in preparation to be on air once we acquired the licence through Wits University, with the first person to be sent for training being Bongani Maluleke. We also had young people from Diepsloot recruited and taken on training at Wits University, but the majority of them were lost due to the licence not being acquired in time. The licence could only be acquired on 23 May 2013, but the radio station stayed for a year and a half without being on air because of lack of equipment. That was the most frustrating time in the history of the project. MDDA was promising

that they will only consider our application in 2016 but only if funds are available, which made it difficult to even bear the thought of having a licence, but now being unable to be on air. Kgolo Trust, through Professor Harbor and Jennifer came on Board to secure the equipment and made funds available to start the broadcasting. The Board was now faced with the second challenge of the venue to broadcast since the venue previously provided for in the community was taken away from the station to be used as a housing office.

We struggled until we were offered a space in a plot next to Diepsloot but in Tshwane Municipality to erect the equipment. The Board was also faced with the challenge that the venue would need to be rented and there was no funds available at that time to rent, but nonetheless the venue was accepted. The equipment was erected but now the room for the studio needed to be sound proofed. We had money to buy basic resources to do sound proofing but did not have enough money to pay someone to do the job at the time. We set a target of being on air on 31 December 2014. Mr Sekutu also brought his two sons to assist. That was done on a voluntary basis because there was no money available at the time to pay workers. During that week presenters were trained to be ready to be on air on 31 December 2014. Indeed the station was on air on the said date.

8. What went wrong?

By 2015 the station was on air with Bongani Maluleke, Mr Senosi and Mr Sekutu assisting in management of the station, but Mr Maluleke being full time at the station. We also had the services of the experienced man on community Radio and commercial radio in the name of Kwetepane, appointed to voluntarily assist the station and was brought in by Mr Ramohlola. Kgolo Trust also seconded Mr Ntshangase to mentor both Karabo and Bongani since he had experience on community radio station field. They were prepared to pay him for doing the task for a period of six months. He had a fall-out with Bongani in the first month and then withdrew, saying he will never work with that type of person. Kwetepane called the Board and said he did not think he will continue with the station because Bongani is not the type of person he can work with. We had a meeting with Bongani as management and he said Kwetepane is not telling the truth because he told him that he cannot afford to volunteer since he had kids to look after and we felt onto that story. He had a fall-out with one of the presenters and pulled him out of the station while on air and the Board called an urgent meeting to address the matter. He said the presenter was threatening to put a virus into the station to damage the

equipment. When we invited Kwetepane back to manage with Bongani, but, since, realised that he has emotional problems. Kwetepane called Mr Sekutu and said he is leaving because Bongani told him in his face that he will never consult him on matters of the station because he is a Station Manager and therefore the equal power thing is nonsense as approved by the Board. We had staff meetings and issues were raised about how Bongani treated presenters and as management we tried to talk to Bongani, but started seeing that Mr Sekutu as an enemy siding with presenters and since then stopped the issue of meetings.

9. Community meetings

We had one community meeting which was organised by Mr Sekutu while still acting Marketing manager and the station never had any community meetings since that meeting. In attendance of that meeting was Mr Senosi and Mr Bongani Maluleke. The station further had a meeting with Choir Association organised by Mr Sekutu in trying to outline what could be their role at the station and how the station intended on developing and promoting their music.

10. Finances of the station

- We had a donation of R50 000.00 from Jennifer who organised a donation from overseas in Dollars;
- Kgolo Trust donated money to have starting equipment;
- MDDA sponsored the station with an amount of _____.(the amount is not mentioned : Chairperson CCC)

Funds from MDDA were ring-fenced for particular items and were to be deposited in phases. Some money was to be deposited directly into account of suppliers registered with them for equipment. They also ordered that the station must have a separate account for the money sponsored by them. *In fact, it is this money that alerted the Board about the withdrawal of money without authorisation.* The station is getting money from revenue generated from adverts. It is this item of finances that made Board members to have problems. It was discovered that the finances of the station are used without the approval by the Board. Board members said and demanded the financial statement from Mr Senosi and it was a struggle to get such report. The Board demanded the financial statement and it was a struggle to get one until Ms Segale and Ms Hlophe were requested to get one. *We found out that a lot of money was withdrawn and therefore resolved to have forensic investigation into the funds of the station. This resolution was taken through consulting the law firm of the station.* It

was found that two members of the Board were withdrawing money without any approval from the Board and used some money together with the station manager for personal purposes. The law firm advised that a *criminal case* be opened and it was since opened against the two Board members who were since arrested and are out on bail. *The Board resolved that no money be withdrawn in cash but to be transferred at all times via EFT.* They also resolved to change the two members as signatories and replaced them with two other Board members. The Board was shocked to hear from the Police that the very two Board members came into the Police station alleging they were robbed of the cash belonging to the radio station.

Presenters: The station operates on volunteer presenters who come for either two or three hour slots to the station. The presenters are purely volunteering and the station is expected to pay them a stipend if there is money available. The station is used to develop the presenters for commercial radio stations as professional presenters.

11. *What made the Board not to have Annual General Meetings*

The founding Board met numerous times at the beginning, but due to challenges faced by the Trust in getting the first project up and running, and a lack of funding, they decided that Mr Ramohlola and Mr Sekutu work on the projects. The agreement was reached that if there may be a need for Board intervention on any matters, then a meeting will be called. The agreement was reached that once we secured funds from any donor, we will then be compelled to audit funds and hold AGM's to report on the usage of such funds. This gave rise to the challenge of getting a Board together for certain decisions and that led to the formation of an interim Board as mentioned above. Funds were secured by the interim Board and an auditing firm was appointed to develop financial statements but the Board failed to hold an AGM because of the following reasons: First funds that were secured were used to train presenters to be ready in case we are granted a licence. Unfortunately the station could not secure a licence until the presenters were all committed to other matters of their lives. The same funds assisted the Board to pay for the licence application with ICASA. *The licence was granted in 2012 but we could not broadcast for one and a half year due to lack of funds to buy equipment. Kgolo Trust came to the rescue of the Trust through the guidance of professionals like professor Harbor and Jennifer.*

Two people ran the station and they made it difficult for the meetings to be quorate, but when there is a document that needed to be signed, they would make sure that the meeting is convened. It became a struggle until MDDA approved funding to the

station and that's where a lot of rot was discovered. Some members of the Board did everything to get things right but the chairperson and the station manager made sure that that does not happen. That is where they decided that we must seek legal help and Werksmans Attorneys were consulted. They agreed to help and an agreement was signed, but to date we are still struggling to get our house in order to comply with the provisions of the Original Trust Deed which was sent to you. We have attached some of the correspondence with Werksmans attorneys in trying to salvage projects from the hyena's whose intention was only to serve their own selfish interest but not the interest of the community as the project was intended to. A criminal case was opened against the two Board members who used the money of the station without consent from the Board and such moneys are unaccounted for.

12. Community developments initiatives

Nothing tangible has been done thus far towards development of the community as per the objectives of the Trust and the radio station. Funds are found to be benefiting the individual interim Trust members and the law enforcement units are not assisting in this area. *We know that presenters are expelled from the station and we are unable to help them because of a corrupt station manager and two Board members who do as they please with the funds of the station. One interim Board member has resigned and the other is literally not active. This leaves those who are really interested to develop this project to the development of a frustrated community. We are planning to take this matter to private prosecution because we feel the NPA is failing this project. The case was provisionally withdrawn from court due to unavailability of the founding documents of the station's account. We are further consulting with the founding Board to officially sign letters of resignation so that a proper Board can be constituted and correct accounts opened and administered properly. Werksmans attorneys are ready to assist in this regard.*

13. Management of the station

The station must have four management members. The station manager, programme manager, marketing manager and the financial manager. It is this structure that we agreed to as a station on how we are going to move the station forward.

Challenges

Presenters: All old presenters are expelled from the station by the station manager. The marketing manager is told that he is no longer needed at the station. The Board

members were arrested, but now the case is provisionally withdrawn for using money of the station for personal use without permission. *The station manager was handed a suspension letter on numerous allegations but the chairperson did not want to collaborate anymore for disciplinary process, since they have access to the station's account. It is alleged that a new account was opened which is operated by the chairperson and the station manager. The station manager is informing everyone at the station when employing or expelling them, that the station is his personal property and not owned by the community.*

14. Conclusion

The current interim Board is highly divided between those who want the station governed as per the Trust Deed, and those who will be stopped by nothing to be unethical. There were times where a representatives from MDDA visited the station but really added pain to the running of the station. We could say they contributed to the challenges of the station and the sad part was that they were invited by Mr Sekutu, being requested by other members of the Board to come and assist. The interim Board further had a meeting with one representative from both ICASA and MDDA, who alleged at that time that they were sent by the two institutions to assist and a plan was put in place to salvage the station but they have since gone.

It was said in the meeting that if they are truly sent by the two institutions, then the station will be rescued, but it was observed that they were invited by the station manager who wanted to use them for his own interest. Part of the resolutions in the meeting was a plan towards an AGM. *This project needed to be rescued and some founding Board members are available to take the station to AGM, so that they can formally resign. The Trust was registered in such a way that each development project will be registered as an NPO to run independently, but account to the Board on any monies fundraised. For any money that will be coming to the projects from government, was to be managed from the Board.*

EXPLANATION FROM A DIRECTOR

[5]My name is Bongani E Maluleke. *I am the coordinator of the project and a station director.*

Unofficial Trust Deed

The Trust Deed in question came with the founding member Silas Ramohlola and resignation letters from other interim Board members. Two have passed on and others cannot be found. They handed them to me in 2008 as they no longer wanted anything to do with the radio station. It has put his life in danger so that he fled to Tembisa and along the way he lost the documents. I requested him to find those remaining or anyone near Diepsloot, he said there is none and I had only him as a source of the previous team that failed to have the radio idea by the late founder a MuVenda who was shot and killed according to Silas. *That is the only Trust Deed handed to me by Silas Ramohlola. When I was done with drafting the application and found sponsors, and ready to submit to ICASA, I asked Silas Ramohlola if he had found one Board member on the letter of Authority.* He said there is Peter Sekutu but he does not want him to be a part of the radio as he will disturb the operation. He gave me his address and I requested Peter Sekutu to be part of the submission. Peter agreed on terms that he will only sign to help in getting the licence processed, but as soon as the licence is approved he will resign as he cannot work with Silas due to their previous issues.

Operational and fund disapproval

We have an operational team that has been divided by Peter Sekutu and Silas Ramohlola. They promised the team I work with manager position. They started to misbehave and influence staff members to disregard the rules. We never had funds when we started in 2014 but only R50 000 donated by Kgolo Trust. I applied to MDDA in 2013 and funding was approved in 2016, that's with Peter Sekutu and Silas Ramohlola.

Station and Financial Manager signatory powers

We opened the account after informing the Board. We had an operational fee and was behind on rental after Chairperson Itumeleng Senosi and Eunice Mashego (then treasurer) could no longer withdraw the operational budget, after a case was opened against them by Peter Sekutu. The Trust Deed given to me by Silas Ramohlola allows that and was approved by ICASA.

Turned away people

Everyone who sent the station an email to work with has worked with the station and some still do. We have 36 community members working at the station. Religious institutions have their preaching slot every Thursday, we have LVA Lawyer coming to the station every first week of the month, the Police gives their report on current affairs every Thursday,

community members bring the issues affecting them – from electricity, house selling fraud, project fraud and even Eagle Watch members brought the crisis to the station to be heard. The new department existed and paused and during this pause presenters did the news updates and the recent news team started. By 13 May 2019 it ended and others were still on training, but they too stopped. The news editor came on 21 May 2019 at 18H00 on time of her current affairs show and said people are threatening her life because of the existence of news department and she requested to stay away from the station because of fear. Then on the morning of 24 May 2019 the second burglary within a period of a month took place. Our broadcasting system, which we replaced after the first burglary, was stolen. And this letter from Eagle Watch included news department inactiveness. I, being a paramount, I think it came in the picture because I refused to take orders from Eagle Watch as they wanted to run the station by ordering me to reinstate that person who left the station for a year, was a member of Eagle Watch.

The Board's failure to oversee

The only active individuals on the Board were Itumeleng Senosi and Eunice Mashego. Tebogo Maake was helping a bit in 2015, Peter Sekutu and Silas Ramohlola came back and started to act caring about the station when funding was approved in 2015. In 2015 Sekutu organised his neighbours and his ANC youth and wrote them a letter which was saying I fired people and they requested me to be fired. Certain members of the Board that expired in 2016 enjoyed interfering with the operations which affected the station's growth. They use bodies like Eagle Watch to drag and disturb the smooth running by management.

The Auditor

In 2015 Silas Ramohlola took me and Senosi to Johannesburg to meet an auditor Mangaliso. He could not help us. I then went to Solution House hoping to get information or help with an auditor, but that's where I met Mr Bigbrain Moloji. We created a SARS account, he audited our financials and we paid him with advertising. When MDDA funded us, Peter Sekutu said I must replace Moloji with his daughter's godfather, a white man. I told him, Moloji helped us when we had not money, why replace him and we promised BEE. After we submitted our original files to Moloji like I did before, he called me and wanted to introduce me to someone, to find Zimbabwean man who was already having our files without my knowledge. That is where our documents went missing. After I put my brother's daughter as my whatsapp profile picture, that made the accountant to go and search for pamper slips to add on our reduced slips so to fit the profile.

The management Board meeting request

It was a meeting where we requested the operational and Spectrum Renewal fees. The Board who claimed to have stopped withdrawals, approved only Spectrum renewal fee and refused the release of the operational budget where data, phones, printers and paper was needed to run the station.

When they came to the next meeting, they came with a letter saying I am suspended and they are still doing investigations on what, I don't know. This was done in front of staff without a prior meeting with management. The Board ordered the presenters to choose a manager among themselves right on the spot. Since some of the presenters word on corporate, they asked them questions and procedures, which the Board had no idea of and chose to ignore it.

Board public meeting

The Board had only 2 active members. The meeting was held in 2018 when the licence expired where people to sign for renewal were to be elected. It ended up with ANC members electing each other to Board positions. On a voice clip which I will attach, Peter Sekutu is heard saying that he tipped the counsellor to do things that way.

On 31 January 2019, Eagle Watch secretary, Joyce Mabotsa instructed former marketing manager (now an Eagle Watch member) to come and interrupt the station's 2019 opening meeting with presenters who left the station in 2015.

Diepsloot Community Radio Station Trust cannot have a business account. It was applied using signing members, where Tebogo Maake, Itumeleng Senosi, Patrick Maseko, Karabo Hlope, Rose Segale(resigned) and Wilhemina Mathlatsi (relocated) were picked by Silas Ramohlola.

Eunice Dudu Mashego was elected at the community Board election meeting and Peter Sekutu was the last to join and was called back to the station by myself since he was on the letter of Authority. I solely worked since 2008 to lease this radio to the developmental level of the community. Recently we have more than 10 small businesses to uplift through governmental aid and an integration plan is afoot with Olieven Youth to join the station on a radio training basis.

It seems this team is fighting for the trust document which they registered but did nothing about them. It will be very important to transfer the radio project to another organisation

which I will register and leave them with their new Trust to work and feel the pain of sleepless nights.

We have recently lost the equipment that enabled us to connect with the community through events and outside broadcasts, and one presenter managed to help with a mixer, so we are back on air. All the cases of case number: 455/4/2019 happened on 26 April and case number: 346/5/2019 happened on 24 May 2019 and was still at the Diepsloot Police Station.

REPLY OF COMPLAINANT TO BOTH THE BOARD AND THE STATION MANAGER

[6] We acknowledge that we have read through both responses by the station manager and the Board of the station (SLOOTFM).

ON THE RESPONSE TO THE MANAGER

The *manager*, in his response it shows and it appears as if he is deflecting his responsibilities to the Board. I argue that, as his responsibility as a coordinator and manager, it is his job to report to the Board timeously on any happenings with the station. I'd like to also put it to him that the functions of the Board has nothing to do with operations, so there is nowhere where you would find a Board member seen on operations. From time to time, unless something doesn't add up, even the Board's policy states either the official or unofficial Deed of the Trust. He keeps mentioning only two Board members namely being Ms Eunice Mashego and Mr Itumeleng Senosi. The Board has 8 members on the unofficial Deed of the Trust which he received from Mr Ramohlola and he also mentions that 2 were against progress of the station, namely Mr Sekutu and Mr Ramohlola. How come only 4 members was the forefront of the operational aspects of the station, yet the first 2 were the ones with signing powers at the bank and others weren't. At the same time, the ones with signing powers at the bank ended up in jail and the others didn't.

Mr Maluleke hasn't responded to the robbery of the money which was intended to be transferred to the supplier, which it turned out to be robbed from them while in the car grouping this cash at the station and till this day no case of robbery was reported to the SAPS (this robbery was articulated by Mr Sekutu in his statement).

Issue of the auditors

How come Mr Maluleke has worked well with Mr Moloï and he paid him for his services by promoting his business on the radio? All of a sudden, the very same Mr Moloï turned against Mr Maluleke, just after the station received the funds from MDDA, where some of the receipts, according to him were pamper receipts, alleged that Mr Moloï was the profile picture of Mr Maluleke's niece and then out of the blue the accountant acted fraudulently.

We requested the reports from the accountant's firm (Mr Moloï), which he supplied us under the instruction of the Board. We have read the report and it is appalling to see that the Board couldn't agree to submit the resolution to Mr Moloï so that he could close the station's report, since there hasn't been any evidence of purchases to the amounts unaccounted for, but yet Mr Maluleke is only outlining the pampers which doesn't even come close to the amount unaccounted for. When the file was sent to be audited, was the funded amount exhausted for the financial year? Does the station have financial policies in place?

We would like to request the commissioner to persuade the station manager to provide the records of adverts made by the station since 2015 when the station was now fully on air.

Issue of management and Board meetings

The Board, since it was not a collective any longer, and based on the financial reporting being in the red, how can the Board allow the funds to be allocated for that period whereas the financial reporting states that accountability is non-existent.

According to the suspension letter dated 25 May 2018, which was handed to the station manager, Mr Maluleke on 19 November 2018 again, why would the Board wait that long if they have already decided to suspend the manager? As a station manager does your ship have policies in place to deal with disciplinary process? If not, what have you done to make sure that the procedures are in place when dealing with such matters yourself, like you claimed that one of the staff members have not been to work for a year. What processes have you followed to deal with such behaviour in the workplace?

Board Public meeting

As Mr Maluleke highlighted, the Board's public meeting was convened in 2018. We have consulted with Mr Sekutu, Mr Maake and Mr Maseko and requested Mr Sekutu to call the rest for that consultation meeting to clear some issues that presenters raised. That is

where the issue of the so called public meeting was cleared. It was said that the same Board's public meeting was never called by the Board, but they elected presenters to re-elect a new Board since according to all information given by Mr Maluleke to his staff was as he outlined on his statement of events.

That meeting sat first on a Thursday, and was then postponed to Saturday due to the unavailability of stakeholders. After that postponement there was a caucus among the organisers and the manager, including the ward councillor Mr Maboke. The decision was taken, influenced by Mr Maboke, that he will invite all the stakeholders to the set date of Saturday at Methodist Church, and Mr Maboke even told the caucus that he will share the meeting as Mr Maluleke was conflicted. It happened that Sunday where many of those who attended were ANC members and few of the other political parties namely EFF and DA. During the process of that meeting the financial report was given and the auditor was present, he even gave a few words with his partner. The voting began and ANC took those votes. EFF was angry, together with the DA. Many in the room chanted that the station manager be removed. Mr Maluleke even tried to comment and he was denied to comment so as the rest of the SLOOTFM staff. Mr Maluleke left the meeting angry. To the surprise of all, the meeting was now taken as void. On Monday EFF members came to the station and threatened to shut it off. We would also like to hear the clip swaying the votes by Mr Sekutu as Mr Maluke outlined in his version of the events.

Everything we do, we record it in black and white. For this reason, our secretary told Mr Makale, who is the marketing manager of the station, to disrupt the operation of the station. We have transcripts of Mr Makale coming to us for assistance with regarding to him being removed from his position with due course. We have that notice that Mr Maluleke sent to Mr Makale and even Mr Makale's letter of request for assistance.

We tried on numerous occasions to contact Mr Maluleke to respond on the said letter. We couldn't for a period of time, until lastly he responded to our emails which we have as proof of our communication. He never agreed to that meeting till Mr Mathole went. Mr Mathole chaired that meeting which we have minutes of and a recording of the proceedings, which we can make available if required. In that meeting, Mr Maluleke agreed that Mr Makale can return to his position since he failed to prove the procedures he followed when removing him. The same report of the meeting was communicated with Mr Sekutu (Board member).

The station does not even have a reporting line by the community. We requested the requisition letters that he makes if he requires either funds or anything from the Board. Till this day, we have not seen them.

In that meeting, not only Mr Makale was the one suspended, but there was another presenter who was also suspended unlawfully.

I wonder why Mr Maluleke is intervening in the Board's affairs, when he himself as a manager, is unable to address his affairs. It is alleged that Mr Maluleke is owning the radio station. That is why his wording is so entitled to be the mastermind behind it, even stating that he wants to take it out of the Trust to another organisation, which he will register. Mr Maluleke's arrogance is going to destroy this community's project, if not dealt with.

According to each and every company owning assets, the assets are insured in case of damage or thefts. In this regard we have yet again consulted the Board members about the inventory of the station where they are telling us that they don't know what the station is owning. The clear answer is with Mr Maluleke and he refuses to give such information. At last we consulted with the station's financial manager and during the consultation she had no clue what was happening of the direction station's account, but only knew the account funded by MDDA. Yet again, this raised even more suspicions.

We are now convinced that the station hasn't insured the broadcasting equipment, according to Mr Maluleke's statement and the cases of theft that was opened for such equipment.

ON THE BOARD'S RESPONSE

On what went wrong:

[7]We would appreciate if the CCC can invite the listed individuals, Mr Jacob Ntshangase and Mr Augustine Shotolo to verify Mr Sekutu's statement on the part where he referred that they are not working well with Mr Maluleke.

Community Meetings:

As outlined in the statement by Mr Sekutu, they only had one community meeting as compared to what was alleged by Mr Maluleke. We would also like to request the commission to persuade the Board to make the minutes of those meetings available to verify the meeting.

Finances:

We would like to request the commission to ask the Board to provide the records of adverts made by the station since 2015 when the station was now fully on air.

We believe that the signatories to the funds of the station have records of funds handed to the station for operational purposes, since they are the ones who have been withdrawing the fund and handing it to the finance manager or the station manager, including the EFT's made.

Management of the station: We have been in contact with the so called old presenters and some of them made affidavits to confirm their ordeal at the station. They could also be provided when needed, including the petition and memorandum that was sent to the Board.

The station needs renewal from the Board to the management team in order to succeed. For that to happen we need your (Commission's) intervention to make sure that polices are made and followed

FINDING BY THE CCC ON THE CHARGES

[8] The core of the complaint, as set out earlier, is repeated here and then decided by the CCC:

(a) According to the station's trust deed, of which there are two, one being submitted to ICASA which is not official or declared by the Master of the High Court and the other being official, whereby the members are not the same on both documents, where it raised a concern of how was the other trust deed made without original members stating their unavailability to continue with the project.

FINDING BY CCC: Although an unsigned amended Trust Deed was attached to the Licence which was issued by ICASA in 2018, only the first Trust Deed is valid. Amendments to a trust deed must be filed with and approved by the Master of the Supreme Court and this was not done.

(b) Many operational duties were faced by the station manager alone, whereby the Board couldn't agree on releasing what was needed by the manager of the station: either funds or approval of documentation.

FINDING BY THE CCC: An important error by the station manager, as explained by him in his evidence, is that *he* approached an Auditor to have the finances of the station

audited. As appears from the evidence before the CCC, the books in any case landed with the Board. Appointing an Auditor lies within the jurisdiction of the Trustees and for the station manager to have usurped this function amounts to a flagrant error which implicates the Respondent. He should have known that this function lies with the Board. In fact, this is so obvious that an inference of intentional wrongdoing can be attributed to him.

(c)On the unofficial trust deed and the original, both financial manager and station manager have signatory powers, though in practice it's not as such: 6.1 and 6.4 of the original trust deed document which correlate with the unsigned trust deed on 7.1 , 7.4 and 7.6(hand edited). On the seventh part number 7.2.6 it is not in existence, the Board hasn't engaged or liaised with the community in the years the station has existed . 7.2.7 hasn't been taken seriously.To this date the station has only one policy which is a general labour policy in conjunction with BCEA.Till this day the news department doesn't have an editorial policy, code of conduct doesn't exist...The management committee is non-existent because the station manager claims that he is the only paramount decider.

FINDING BY THE CCC: This matter must immediately corrected by the Chairperson of the Trust for future purposes. Two trustees (out of four nominated by the Chairperson or his nominee) must sign withdrawals and in the absence of one or both of them the Trustees must immediately address the matter with the Bank so that two Trustees may sign.

(d)On the seventh part number 7.2.6: it is not in existence, the Board hasn't engaged or liaised with the community in the years the station has existed.

FINDING BY THE CCC. Regular contact with the Listening community is explicitly provided for in the Amending 2019 Community Regulations and was, in any case, part of the previous regulations. At the heart of a community broadcaster lies its duty to have regular contact, by way of meetings where Minutes are kept, with the community it serves. The Regulations provide as follows:

13. Community participation

- (1) A licensee must ensure that ownership of the community broadcasting licensee remains with the community served.
- (2) A licensee must involve the community members in the management of the community broadcasting licensee.
- (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.

(5) A licensee must submit proof of community participation at every annual general meeting, and other forums that require community participation.

(e) To this date the station has only one policy which is a general labour policy in conjunction with BCEA. Till this day the news department doesn't have an editorial policy, code of conduct doesn't exist...The management committee is non-existent because the station manager claims that he is the only paramount decider.

FINDING BY THE CCC: once again the station manager is in dereliction of his duties and thereby also the Trustees.

(f)The Board has failed to oversee the governance of DCRS in terms of policy making and amending: this includes financial policies as it is outlined by the trust deed on the unofficial document reads No 6 in totality and on the original document 7.2.1 to 7.2.8.

FINDING BY THE CCC: The evidence before the CCC is that there has never been an Annual General or Special Meeting with the Community. The Trust document, in fact, refers to an Annual General meeting. That could not refer to such meeting by the Board alone and must have a wider meaning, so as to include the community which is served.

(g)The station has been in operation for 4 years this year and its objectives haven't been met as outlined on No 5 of the unofficial trust deed and No 4 of the original trust deed. 5.2.1 is not in practice because many individuals have been turned away wanting to participate in the development of the station. In fact the whole of No 5 is not in practice. 5.4 is completely ignored because the station manager has allowed his personal issues with institution heads to deprive the station to grow. 5.6 is also meaningless because access is preferential. The Complainant alleges that it has received numerous unsettled community members saying they can't access the station because its location is not shared and walk-ins are only for friends and those close to the staff members. In a nut shell the station is operated like a private entity.

FINDING BY THE CCC: The only manner for the community to become involved in a community broadcasting station is to officially make themselves available to be trustees or apply for positions at the station and to be appointed by the Trustees. The ultimate order will, indirectly, address this concern by advising Council of ICASA to order that AGM's be held. In any case, the Community Broadcasting Regulations provide that meetings must be held with the community, which has not taken place.

(h)The trust must have a current Bank account, but this is not what is happening in the DCRS because the account is a *stokvel* club account, which it is in contravention with their own rules.

FINDING BY THE CCC: The Trust holds the licence and, accordingly, the Trustees must ensure that the account or accounts would be in its name. For convenience sake all funds necessary to pay salaries and other debts of the Station must be withdrawn by persons mandated by them. Withdrawals must be mandated by the Trustees with at least two persons as set out earlier. The concept of a *stokvel* does not fit the situation and must be investigated and amended by the Board of Trustees.

(i)The income is kept not ploughed back in the community for the development.

FINDING BY THE CCC: The Regulations do not provide that the profits must be ploughed back into the community. It must, however, be ploughed back in the radio station for reasonable expenses both present and future. It is true that it is provided that excess must be ploughed back into the community. However, “excess” is a fact that is far removed from the Respondent radio station.

(j)As to auditing, an auditor was appointed but he can't proceed with the work as a lot of information is missing, like receipts or proof of purchase of consumables and other finance is used without any support of what it had bought. The only closed books are of 2014 to 2016 which again it is closed with a gap of unsupported documentation. For the auditor to close the book he needs the signed off resolution from the Board. Till this day that resolution hasn't been furnished. The auditor hasn't accounted to the Master of the High Court ever since his appointment.

FINDING BY THE CCC: This is unacceptable and an order will be advised to Council of ICASA on this matter.

(k)The management team requested numerous meetings with the Board, to ask clarity on their mandate. They ended up blaming each other. At last the chair failed to take or initiate directive, and he threw his hands up. That to us concluded that the Board is worlds apart and it needs to renew or be disbanded as outlined by the trust deed No 18 of the unofficial trust deed and original trust deed No 17.

FINDING BY THE CCC: This matter must be dealt with by the Board of Trustees. The Trustees have failed in their oversight function.

(l)The original trust, if it is not in use as now, we have received unofficial, there was supposed to be a resolution or agreement by the members of the original trust deed that they amend the new trust deed, which was stated to be unofficial. Now we have two trust deeds with two different members. This on its own proves the ignorance of the Board members currently sitting on the unofficial trust deed. The Master of the High court doesn't even recognize them.

FINDING BY THE CCC: This matter must be addressed by the Trustees, as will appear from the advice to Council at the end of this Judgment. And, as held by this Tribunal, the second Trust Deed is not valid.

(m)A further complaint was that Sepedi is (substantially) the broadcast language of the Station.

FINDING BY THE CCC: This claim is not substantiated in detail and needs more evidence. It is basically a matter into which the Complaints and Compliance Affairs Division of ICASA must look into and, if necessary, file a substantiated complaint with the CCC. It must be borne in mind that if this is so, it amounts to a flagrant contravention of the Licence issued to the station.

CONCLUSION BY THE CCC

[9] A high standard of compliance is expected from a licensee. In *S v Waglines Pty Ltd and Another*³ Judge Didcott held that “ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*” To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice. Compare *S v Longdistance Natal Pty Ltd*⁴ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

*“Mens rea*⁵ in the form of *culpa*⁶ is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

If a charge is not included in the charge sheet, the CCC is not permitted to add such charge itself. The principle is well illustrated by the judgment of the Supreme Court of Appeal in

³ 1986(4) SA 1135(N).

⁴ 1990 (2) SA 277 (A).

⁵ Translated: “a guilty mind”.

⁶ Translated: negligence.

Roux v Health Professions Council of SA & Another [2012] 1 All South Africa Law Reports 49 (SCA).

Bearing in mind the evidence placed before the CCC, it upholds most of the charges as delineated in paragraph [8]. Had this radio station, in the past, been found in contravention *frequently*, the CCC would have been justified in advising Council to close the station down for a month – the maximum period which is provided for in section 17E of the ICASA Act, where it has a bearing on a *broadcaster*. The evidence, judged as a whole, has confirmed most of the charges, as set out in paragraph [8]. The radio station finds itself in a state of poor management. The CCC is of the firm conviction that the radio station is not functioning according to law as a result of Trustees who have left or stepped down or are simply not to be found and a shocking lack of proper financial and administrative management.

However, it is mostly, on the facts before the CCC, almost impossible, where there is mudslinging and recrimination from both sides, to determine where the fault lies - see *Espag and Another v Hattingh* 2010 (3) SA 22 (SCA) where Leach, Acting Judge of Appeal (now, Judge of the Supreme Court of Appeal) states the following:

“[3] All too often in litigation arising out of the dissolution of a partnership, the papers become burdened by mutual recriminations and mudslinging. Unfortunately, that is here the case. No purpose would be served in attempting to detail the wide-ranging allegations levelled by each side against the other as they are impossible to determine on the papers. The Constitutional Court has also cautioned the CCC against unfair investigative activity. It is clear that the station has problems which result from personality clashes and allegations of mismanagement of funds...”

Nevertheless, the CCC has considered the evidence as a whole and there are crucial matters which must be addressed. However: it is also not the task of the CCC to solve or address, on the argument and allegations before us, all the problems which the Board or Station Manager must address internally. It is, for example, on the argument and facts before the CCC, impossible to decide who was responsible for the loss of money or alleged theft. Insinuations and allegations, yes: but proof beyond reasonable doubt (the task of a Criminal Court) cannot be determined within the ambit of this investigation. We have, however, made certain findings and they form the basis of the advice to Council. To address the problems, the CCC will, hereunder, however, advise Council to order that certain internal procedures be undertaken to address the problems raised.

[10]The CCC has, thus, come to the following conclusion:

(a) It is not necessary for the CCC to investigate the trust which was set up in 2000 to found Diepsloot. Fact is, a licence was issued to Diepsloot Community Radio Broadcasting Trust and renewed on 31 May 2018 by the Authority.

(b) With the re-issue of the licence by ICASA, the unsigned trust deed was attached to the license. This must have been an oversight caused by the licensee, since the attachment differs in a few respects from the original Trust Deed. The unsigned Deed is not valid. The licence was awarded to the Trust and the only valid document remains the original, signed Trust Deed until an amendment is approved by the Master of the Supreme Court.

(c) The Trust Deed does not provide for the manner in which Trust vacancies may be filled and it would seem that there are only a few of the original Trustees left or available to serve. What must, however, be taken into consideration in this matter is that the law does not hold one to the impossible. Compare the following statement of Scott JA in *Snow Crystal, MV: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) is of particular relevance to the present matter:

This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. *The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault.* (Footnotes omitted and emphasis added)

(d) The situation which existed when the Trust was created compared to the present position demonstrates that circumstances have indelibly changed. Sadly people pass on, are simply not to be found or are no longer available to act as trustees. The trust, which is a legal entity, has however remained valid and ICASA, in 2018, when renewing the licence, once again awarded the licence to the Trust. It has, however, become necessary, by operation of law, to make certain amendments to the Trust Deed. ICASA, as mandated by section 192 of the Constitution of the RSA, as the Regulator of broadcasting, cannot permit a licensed radio station to be divided by a power game. The idea of a Community Broadcaster is to be part of a community and not be torn apart by rivalry, despotism and questionable records of financial affairs. This must come to an end and, ultimately, on complaint or reference by the CCA at ICASA, the CCC may advise the Council of ICASA to close down this station if the organisational structures and persons involved do not subject themselves to the Law and work together as a team. It is true that a station manager is in

charge of the daily activities of a radio station – as is usually the case in any business structure with a Board and an Executive. The Board lays down broad policy and if an amendment to the Policy takes place which affects the management of the station, the manager *must* comply – and be subjected to a legally proper disciplinary inquiry by the Board, *to which he is called up with reasonable notice*, if he or she does not comply with the policy. Ultimately, the station manager is an employee of the Trustees and must consistently respect their resolutions. *It should, however, be mentioned that, given the facts of the matter before us, the Manager of the station should be permitted a proper hearing by the Board before it is decided to suspend him, if that is still on the agenda of the Board of Trustees after the SGM at the end of March 2020, as advised to be ordered by the Council of ICASA.*

(e) An important facet of the 2019 Regulations for Community Broadcasters is the role of community committees. Of course, that does not mean that the community is in a higher position than the Board, but the *soul* of a community broadcaster lies in the people that it serves. Accordingly, the following regulation is of crucial importance and the omission to apply it amounts to a contravention which could lead to this Tribunal advising the Council of ICASA to impose a heavy penalty on the licensee: ⁷ Regulation 13, as earlier quoted, provides as follows:

13. Community participation

- (1) A licensee must ensure that ownership of the community broadcasting licensee remains with the community served.
- (2) A licensee must involve the community members in the management of the community broadcasting licensee.
- (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.
- (5) A licensee must submit proof of community participation at every annual general meeting, and other forums that require community participation.

⁷ Regulation 17. Contraventions and Penalties: (1) Any person that contravenes Regulations 9, 10, 11, 12, 13 and 16 is liable for a fine not exceeding 10% of its annual turnover.

(f) What must be read into the Trust Instrument is the reality that the Community which is served must hold Annual General Meetings⁸ and, except for Annual Financial Statements (as approved by an Accountant or Auditor) and other matters on the Agenda, it must also elect the Trustees.

It should be added that a community radio station is not a public gallery where members of the community may enter without permission – as would seem to be suggested in the Complaint. In fact, its security systems are vital.

ADVICE TO COUNCIL

That the Council of ICASA consider the following order for approval:

(1)The present Trustees - and to be practical, even if not yet approved by the Master of the Supreme Court - remain the Trustees until the approval of the Master of the Supreme Court is given for the newly elected Trustees.

(2)That a Trustee who was *originally* a Trustee, as approved by the Master, remains a Trustee, except if he or she is not available to serve. And this is stated at the April 2020 Special General Meeting or in a letter to the Chairperson of the Trust by that Trustee.

(3)Except in regard to the category of Trustees as stated in (2) above, the other Trustees, who are not elected, step down when the approval of the new trustees is provided by the Master of the Supreme Court.

(4) Furthermore:

- (a) That a Special Elective General Meeting be called by the Chairperson of the Trust, to be held on a Saturday afternoon before end March 2020 and that a Board of Trustees be elected in accordance with the positions set out in the signed Trust Deed. That the meeting and venue be advertised three times a day for 14 days by way of broadcasts between 07:00 and 21:15 and that copies of such broadcasts be filed with the CCA at ICASA, within 10 days of the Meeting, if so required by the CCA.
- (b) That the names and curricula vitae of new Trustees be filed with the Master of the Supreme Court in Pretoria or Johannesburg with the assistance of an attorney within 30 calendar days after the Meeting, alternatively by the Chair and Station Manager.

⁸ There is a reference to an AGM in the original Trust Deed.

That the Master of the Supreme Court, respectfully, be requested to deal with this matter on an urgent basis and that this order (and this judgment) be provided to his or her Office with a copy of the original Trust Deed (as signed) by the Chair of the Board of Trustees. That if there are amendments to the Trust Deed, as approved by the Trustees, that these amendments also be provided to the Master for approval. The election of future trustees at an AGM or SGM must also be included in the application before the Master of the Supreme Court.

- (c) Until the Master of the Supreme Court approves the *new* trustees the newly elected trustees may **not** vote at Trust Meetings, but they are entitled to and are expected to be present at Trustee meetings and may take part in the discussions. Their term of office commences directly after the Special General Meeting referred to above, if approved by the Master of the Supreme Court.
- (d) That the term of Office of the Board of Trustees be determined by the Election AGM. Original Trustees, however, in law remain trustees until removed by the Master of the Supreme Court.
- (e) That an Annual General Meeting be held every year (also in 2020, before end November on a Saturday afternoon) where matters on the Agenda will be dealt with. That notice on the radio of such meeting and the locality thereof be given three times a day for 21 calendar days before the meeting between 07:00 and 21:15.
- (f) That the Financial Statement for the previous financial year be approved at every Annual or a Special General Meeting. If the Statement is not available at the Annual General Meeting it must be approved at a Special General Meeting in the same year.
- (g) That the Financial Statement be approved by an Auditor or Accountant and be filed with ICASA within one month of approval by the AGM or SGM, alternatively that ICASA be informed by the Chairperson of the Trust if it is not approved and what steps are being taken to address the problems.
- (h) That persons of 18 and older be permitted to vote and that all attendees must indicate on a list made available at the meeting: their Initials and Surname, Living Address within the broadcast area plus ID number and signature. It should be borne in mind that persons in political office may not be elected to the Board of Trustees, but may vote.
- (i) That the CCA at ICASA be informed in writing at least 21 calendar days before an Annual or Special General Meeting of the date, time and place of the meeting.
- (j) That at least two formal meetings per year, well-advertised, be held with listeners in the Broadcasting Area by at least two Trustees and the Station Manager. The

meetings should be held at a readily accessible place. Views expressed by the meeting must be placed in a Report by the Station Manager and considered by the Trustees at its Meetings.

- (k) That the Station Manager must provide full assistance to the Chair in organising the March 2020 SGM referred to above and other meetings as well as the preparation of the documentation for such Meetings.
- (l) That the Station Manager must be in regular contact with the Board of Trustees and ensure that, insofar as Policy and other related matters are stated in the Trust Deed and the ICASA Regulations for Community Broadcasters, the Trustees' resolutions are implemented. The Manager reports to the Board, which is his or her employer.
- (m) That the newly elected Board of Trustees at its first meeting, to be held within 21 days from the election date and called by the Chairperson, require a full report from the Station Manager as to the financial management and affairs of the station and that such report be filed with the Board of Trustees at its following meeting, which must be held at the latest three weeks after that meeting. That an Auditor or Accountant be appointed by the Board of Trustees to report on the financial affairs of the radio station before end May 2020.
- (n) That at least 9 meetings of the Board of Trustees be held per year with the Station Manager or his or her representative present, who must keep the Minutes of the Meeting and let Trustees have a copy thereof within a week after the Trustee Meeting. Where the Station Manager is unable to be present, he or she must obtain the permission of the Chair of the Board beforehand, providing acceptable reasons to the Chair, who must ensure that another senior member of the Staff represents the Manager.
- (o) That a full Report of Compliance with the above order be filed by the Chairperson of the Trust – such report having been approved by the Trustees – on or before 30 August 2020 with the Senior Manager of the Complaints and Compliance Affairs Division at ICASA.

ADVICE TO COUNCIL IN TERMS OF SECTION 17B(b) of the ICASA ACT

That the Complaints and Compliance Affairs Division of ICASA be directed to:

- (1) Investigate whether Diepsloot Community Radio Broadcasting Trust is in contravention of its licence insofar as licence condition 5.1.4 is concerned (the language clause);

- (2) Investigate whether Council's order, as above, has been complied with by 30 September 2020.

J. C. W. van Rooyen

JCW van Rooyen SC

13 December 2019