

COMPLAINTS AND COMPLIANCE COMMITTEE

Case No: 74/2014

In the matter between

Direng Investment Holdings (Pty) Ltd

Complainant

And

21st Venture Capital (Pty) Ltd

Respondent

Committee

JW Tutani	Chairperson
Dr. M. Socikwa	Councillor
Prof. K. Moodaliyar	Member
T. Ramuedzisi	Member
M. Ramokgopa	Member
N. Maseti	Member

For the Complainant

Mr. Avhasei Mukoma; and
Mr. Tshilivhali Mbengeni of Mukoma Attorneys

For the Respondent

Advocate Gerhard Dobie instructed by
Attorney Mr Leonard Singer

Judgment

JW Tutani

Introduction

[1] The Applicant in this matter is Direng Investment Holdings (Pty) Ltd ("Direng/ Applicant") a company incorporated in accordance with the company law of the Republic of South Africa with its registered physical address at 15A Cadoban Road, Bryanston, Johannesburg.

[2] The First Respondent is 21st Venture Capital (Pty) Ltd ("21st Venture") a company duly incorporated in terms of the company law of the Republic of South Africa with its address at c/o Bookkeeping Solutions, 263 Kent Avenue, Roan House, Randburg, Gauteng.

[3] The Second Respondent is North West FM (Pty) Ltd ("North west FM") a company duly incorporated in terms of the company law of the Republic of South Africa (previously known as Golden Dividend(Pty) Ltd), with its principal place of business at Unit 1, Delta Place, Mabe Business Park, 17 Kwebe Avenue, Rustenburg.

[4] The third Respondent is SADTU Investment Holdings (Pty) Ltd ("SADTU") a company duly incorporated in terms of the company law of the Republic of South Africa with its principal place of business at 11 MacArthur Avenue, corner Malibongwe Drive, Unit 6, Verona Office Park, Robindale, Randburg.

[5] The Fourth Respondent is Motswere Trading (Pty) Ltd ("Motswere"), a company duly incorporated in terms of the company law of the Republic of South Africa with its registered physical address at B624, Morudi Street, Thlabane, Rustenburg.

[6] The Fifth Respondent are the Trustees for the time being of the Khethani Trust (Khethani).

[7] The Sixth Respondent is African Media Entertainment Limited ("AME"), a company duly incorporated in accordance with the company law of the Republic of South Africa with its principal place of business at AME House, Oxford Park, Houghton Estate, Johannesburg. AME is the nominee of 21st Venture.

[8] The Applicant, First, Third, Fourth and Fifth Respondents are shareholders in North West FM and First Respondent is a foreign shareholder.

Background

[9] The Applicant lodged a complaint on an urgent basis on 27 March 2014 against 21st Venture, a foreign shareholder of North West FM, to the Complaints and Compliance Committee (the "CCC") and which was heard on 9 June 2014. On or about 10 November 2007 and 23 April 2008, the shareholders of North West FM agreed to the capitalization of North West FM by 21st Venture and shareholding adjustment. The effect of this "side" agreement which comprised two resolutions, was to allocate 20% equity to AME, 21st Venture's nominee and this was allegedly in contravention of section 64 of the Electronic Communications Act No 36 Of 2005 ("the ECA"). The transaction also allegedly disregarded certain clauses contained in North West FM's shareholder's agreement.

[10] The side agreement was entered into with the Black Economic Empowerment (BEE) shareholders, namely, the Applicant, SADTU and, Motswere. Twenty First Venture had indicated an intention to enforce the side agreement and had approached court for an order forcing the board of North West FM to implement the side agreement and transfer 20% equity in North West FM to AME. Applicant alleges that it is of the view that the court action will destabilize the radio station as the enforcement of the resolutions is allegedly in contravention of section 64 of the ECA.

[11] Applicant alleges that 21st Venture has not disclosed nor tabled to the board of North West FM the sale of shares agreement entered into between it and AME. Applicant says the board of North West FM is delegated the powers to consider and approve any change of shareholding including any sale of shares to AME.

[12] It is only when the BEE shareholders could not get funding to launch the radio station that they agreed to financial assistance by 21st Venture. Twenty First Venture offered to fund the radio station (R2.7 million) on condition that the BEE shareholders agreed to sign the side agreement. The BEE partners agreed to sign the side agreement "under duress", as they feared that ICASA would rescind the licence if the station was not launched.

Relief Sought

[9] The relief which the Applicant sought was as follows:

- 9.1 That the side agreement (two resolutions) be declared null and void;
- 9.2 A declaratory order; and
- 9.3 That ICASA has a discretion to either revoke or suspend the license if there is any contravention.

[10] Although BEE shareholders and North West FM have been cited as respondents, they have not been accused of contravening section 64 of the ECA and no relief is sought against them. As shareholders, however, they do have an interest in this matter. In *Caxton and CTP Publishers and Printers Ltd vs The Independent Communications Authority of South Africa and Others* 2009 SA at 34 Claaseen J said “*a breach thereof (sections 64, 65 and 66) would either invalidate any licence or at least prevent an applicant from obtaining a licence.*” A contravention of section 64 of the ECA is of such a serious nature that it can invalidate the licence of North West FM as shown by the judge in the Caxton case. The learned judge went on to say that ICASA *has extraordinary wide powers to institute and execute investigations into any issue relating to a broadcaster regarding not only the normal requirements, but also specifically its control, shareholding and share capital.*” It is in terms of these extensive powers that the CCC is empowered to investigate the alleged contravention by 21st Venture and also to understand the exact relationship between 21st Venture and AME.

[11] The Applicant alleges that 21st Venture has entered into a transaction that allocated 20% equity in North West FM to AME, without the approval of the board of North West FM and the Independent Communications Authority of South Africa.

[12] The Applicant submitted that *the proposed share-holding adjustment and (sic) appointment of the Sixth Respondent will allow the 21st Venture to exercise control beyond 20% restricted in terms of Section 64 of the ECA.*” (6, Para 14 page 9 of the paginated Bundle). In terms of the sale of the share agreement, 21st Venture has been paid a sum of R3 million by AME. In fulfilment of an undertaking to refund 21st Venture the amount it had loaned the radio station, Direng had previously “tabled a firm offer” to 21st Venture on December 2013 which it “simply ignored.”

[13] Mr. Mukoma argued that the CCC had the jurisdiction to hear the matter and that if there was a contravention of section 64, that contravention must be dealt with either by the Authority or the CCC.

[14] Counsel for the First Respondent submitted that the CCC did not have the “necessary jurisdiction to make the finding and/or rulings sought by the Applicant for the following reasons:

[15].1 Direng had laid a complaint against the 21st Venture only which is not a licensee and no broadcast licence or any other licence had been issued to it and, accordingly, the CCC had no authority to make any findings against the 21st Venture.

15.1 The licensee in the present circumstances is the North West but no complaint has been laid against it;

15.2 The relief sought by Applicant was to set aside an agreement entered into between itself and the First to the Fifth Respondent; and

15.3 Lastly, although mention is made of the suspension of the licence, such licence is issued in favour of the North West FM against whom no complaint has been laid.

[16] Mr. Dobie argued that *the transfer of shares to the AME would not have the effect of allowing the 21st Venture to exercise control beyond 20% as it will still hold only 20% of the shares whilst the balance would be held by the AME who would exercise control over the 20% it holds.*

[17] Section 64 of the ECA deals with limitations on foreign control of commercial broadcasting services and provides as follows:

(1) A foreigner may not, whether directly or indirectly –

(a) exercise control over a commercial broadcasting licensee; or

(b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.

(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners.

[18] Twenty First Venture is a foreign shareholder of North West FM and the complaint against it is that it *“has contravened Section 64 of the Electronic Communications Act – No 36 of 2005 (the “ECA”).* (25, Page 7 of the paginated Bundle).

[19] The Applicant had made a “firm” offer to 21st Venture to repay the loan plus interest which the 21st Venture “simply ignored.” It is our view that the First Respondent ignored the offer so as to be able to continue exercising indirect control over North West FM. The loan by 21st Venture, in our view, amounted to a financial interest which is prohibited by section 64 of the ECA.

[20] Twenty First Venture, is a foreign shareholder of North West FM and the complaint against it is that it *“has contravened Section 64 of the Electronic Communications Act – No 36 of 2005 (the “ECA”).* (25, Page 7 of the paginated Bundle). Twenty First Venture was the only shareholder which had access to funding. BEE shareholders had made an undertaking that they would source the necessary funds from organisations like the IDC but were not successful. The other shareholders were afraid that if they did not launch the radio station, ICASA would “rescind” the licence. In these circumstances, the shareholders were vulnerable and were at the mercy of 21st Venture which had access to funding. The relationship between 21st Venture and other shareholders was not on the same footing and, through this loan, it exercised indirect control over the radio station in violation of section 64 of the ECA.

[21] The Applicant had made a “firm” offer to 21st Venture to repay the loan plus interest which 21st Venture “simply ignored.” It is our view that 21st Venture ignored the offer so as to be able to continue exercising indirect control over North West FM. The loan by

First Respondent, in our view, amounted to a financial interest which is prohibited by section 64 of the ECA.

[22] There has been a delay in finalizing this matter and this is due to its complexity and importance. Complex legal issues were raised at the hearing and we had to do extensive research and apply ours to be in a position to make a finding.

Dated at Bryanston on 13 October 2014

Councillor Socikwa concurred.

Concurrence

[23] We have had the benefit of reading the Chairperson's judgment (the main judgment) and whilst we respectfully concur with the order made in the main judgment with respect to the issue of jurisdiction only. We are of the view that it is necessary to set out our reasons in support of the order that the CCC has jurisdiction to hear this matter. Since our starting off point is somewhat different from his, and because of the complexity of this case, we will attempt to complement the main judgment with views of our own in greater detail.

[24] The details of all parties in this case are fully described in the main judgment and, consequently we do not repeat them.

Background

[25] On 27 March 2014, the Applicant filed a letter of complaint with the CCC office against the 1st to 6th Respondent. The Applicant ("Direng") asked that the CCC treat this as an urgent complaint. The reasons for the urgency will be dealt with shortly.

[26] A hearing took place on 9 June 2014. Parties before us were the Applicant, represented by Mr Avhasei Mukoma and Mr Tshilivhali Mbengeni of Mukoma Attorneys, and the first Respondent ("21st Venture") represented by Advocate Gerhard Dobie instructed by Attorney Mr Leonard Singer. Also in attendance were two board members of the second Respondent ("North West FM"), namely, Mr Kenny Setzin and Mr Simon Ramodike.

[27] The Applicant is a Black Economic Empowerment (BEE) shareholder in the North West FM radio station, together with the first, third, fourth and fifth Respondents. The third and fourth Respondents are also BEE shareholders. These shareholders formed a consortium and applied for and were granted a broadcast license in 2005 to begin the operations of North West FM.

[28] We will not expand on the detail regarding the capitalisation agreements, save to say that the consortium appears to have been capitalised through two resolutions. The first resolution passed on 10 November 2007 detailed the shareholding as follows:¹

Direng Investments:	26%
SADTU Investments:	19%
Motswere Trading	15%
21 st Venture Capital ²	20%
Khethani Trust	10%
21 st Nominee	10%

[29] A subsequent resolution dated 23 April 2008 altered the shareholding as follows:³

Direng Investments:	21%
SADTU Investments:	16%
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¹ Written resolution adopted by the ordinary shareholders dated 10 November 2007. Pg 13 of the Bundle.

² 21st Venture is a Norwegian Company led by Svein Larsen.

³ Written resolution adopted by the ordinary shareholders dated 23 April 2008. Page 16 of the Bundle.

21st Nominee

20%

Allegations of contravention

[30] There are the two shareholding resolutions which form the basis of this complaint. These resolutions are referred to by the Applicant as the “side agreement”.

[31] According to the Applicant the side agreement would result in a reduction of shares from the BEE shareholders, which are to be transferred to the 21st Nominee. 21st Venture intends transferring 20% of North West FM’s shareholding to its nominee, the 6th Respondent (AME).

[32] The Applicant alleges that this change of shareholding as contemplated by the side agreements will result in a contravention of Section 64 of the Electronic Communications Act 36 of 2005 (ECA). Section 64 provides ‘Limitations on Foreign Control of Commercial Broadcasting Services’ and states that:

‘64(1) A foreigner may not, whether directly or indirectly –

- (a) exercise control over a commercial broadcasting licensee; or*
- (b) have a financial interest or an interest either in voting shares or paid-up capital in a commercial broadcasting licensee, exceeding twenty (20) percent.*

(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners.’

[33] The Applicant’s assertion is that the transfer of the 20% shareholding to the 6th Respondent will result in a foreign shareholder holding or exercising control of more than 20% in the licensee, North West FM, thus contravening section 64 of the ECA and it would subsequently result in the breach of North West FM’s broadcast licencing conditions.

[34] The Applicant alleges that it did not approve of the side agreement and such resolution was not properly tabled to the board of North West FM. The First Respondent denies these allegations.

Urgency

[35] Having lodged their complaint in terms of Section 17A of the ICASA Act 13 of 2000, the Applicant asked the CCC to hear this matter urgently in terms of Regulation 6 of the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Authority⁴.

[36] The Applicant asserted that 21st Venture lodged an application in the High Court to force the board of North West FM to implement the side agreement.

[37] The prayer requested by the Applicant is outlined in the main judgment.

Issues before the CCC

[38] We do not, with respect, agree with the main judgment that the question at issue is the validity of the resolutions undertaken by the shareholders of North West FM. It is important to stress that the validity of this agreement is one to be determined based on the Company Laws of South Africa and the CCC does not have the jurisdiction to hear such matter. The parties have approached the High Court in this regard.

[39] The CCC's mandate arises from Section 17A of the ICASA Act⁵. Of significance to this case, it has jurisdiction to hear matters where there is an allegation of a non-compliance of license conditions as resulting from a Section 64 ECA contravention.

[40] It is important to reiterate the two relevant objectives enacted in Section 2 of the ECA before we proceed:

⁴ Section 6 of the Regulations outlines the procedures to be dealt with in urgent matters.

⁵ Section 17A of the ICASA Act creates the establishment of the CCC. Section 17 B- E speaks to the CCC's functions and powers.

"2. The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—

(h) promote the broad based economic empowerment of historically disadvantaged persons, including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;

(w) ensure that broadcasting services are effectively controlled by South Africans."

[41] The primary issue in argument before us was one of jurisdiction. It was agreed that once the CCC decides upon whether it has jurisdiction to hear this case, and if it was found that the CCC did in fact have jurisdiction, a hearing on the merits would follow in due course. Accordingly, the merits were not argued before us at this hearing.

[42] The first Respondent contended that the complaint was not properly formulated because it, being a shareholder in North West FM, was not a licensee. The first Respondent argued that as Section 64 of the ECA speaks to contraventions of a licensee and thus the CCC did not have jurisdiction to hear any matter that was cited against the First Respondent or the other shareholders who are not licensees.

[43] We acknowledge that the complexity in this case is that the Applicant's complaint was not only brought against the shareholders of North West FM but against North West FM itself. North West FM is the holder of the broadcast licence. The Applicant is also a shareholder of North West FM.

[44] Thus our interpretation is that any complaint of a section 64 ECA contravention brought against the licensee, North West FM, would fall within the jurisdiction of the CCC.⁶

⁶ See *Caxton and CTP Publishers and Printers Limited v ICASA and CCC*, North Gauteng High Court SA 2009 where the Court ordered ICASA to "immediately undertake and complete an investigation of ...[a licensee and non licensee] in terms of Section 64, 65 and 66" of the ECA.

[45] As stated, the CCC has not heard the merits of this complaint, as the hearing ended on the question of jurisdiction. The remedies sought by the applicant would have to be assessed in the follow-on hearing on the merits.

[46] With regard to the emphasis the main judgment placed on Mr Mukoma's arguments regarding the investigation process of the CCC and ICASA, we do not find it necessary to express our views on this issue for the present purpose.

[47] We are in agreement with the order of the main judgment that the CCC has the jurisdiction to hear complaints of non-compliance by a licensee, save in respects specifically indicated herein.

[48] It must be stressed that we are in the situation where we would have preferred to have had more time to expand on the approach that we take on this matter, but accept that time constraints prevent this from being done.

Prof. K. Moodaliyar, Ms. N. Maseti, Ms M.Ramokgopa and Ms T. Ramuedzisi concurring.

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For the Complainant

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Judgment

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Introduction

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[4] The third Respondent is SADTU Investment Holdings (Pty) Ltd ("SADTU") a company duly incorporated in terms of the company law of the Republic of South Africa with its principal place of business at 11 MacArthur Avenue, corner Malibongwe Drive, Unit 6, Verona Office Park, Robindale, Randburg.

[5] The Fourth Respondent is Motswere Trading (Pty) Ltd ("Motswere"), a company duly incorporated in terms of the company law of the Republic of South Africa with its registered physical address at B624, Morudi Street, Thlabane, Rustenburg.

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Relief Sought

[9] The relief which the Applicant sought was as follows:

9.1 That the side agreement (two resolutions) be declared null and void;

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Dated at Bryanston on 13 October 2014

Councillor Socikwa concurred.

Concurrence

[23] We have had the benefit of reading the Chairperson's judgment (the main judgment) and whilst we respectfully concur with the order made in the main judgment with respect to the issue of jurisdiction only. We are of the view that it is necessary to set out our reasons in support of the order that the CCC has jurisdiction to hear this matter. Since our starting off point is somewhat different from his, and because of the complexity of this case, we will attempt to complement the main judgment with views of our own in greater detail.

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Allegations of contravention

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(2) Not more than twenty (20) percent of the directors of a commercial broadcasting licensee may be foreigners.’

[33] The Applicant's assertion is that the transfer of the 20% shareholding to the 6th Respondent will result in a foreign shareholder holding or exercising control of more than 20% in the licensee, North West FM, thus contravening section 64 of the ECA and it would subsequently result in the breach of North West FM's broadcast licencing conditions.

[34] The Applicant alleges that it did not approve of the side agreement and such resolution was not properly tabled to the board of North West FM. The First Respondent denies these allegations.

Urgency

[35] Having lodged their complaint in terms of Section 17A of the ICASA Act 13 of 2000, the Applicant asked the CCC to hear this matter urgently in terms of Regulation 6 of the Regulations Governing Aspects of the Procedures of the Complaints and Compliance Committee of the Authority⁴.

[36] The Applicant asserted that 21st Venture lodged an application in the High Court to force the board of North West FM to implement the side agreement.

[37] The prayer requested by the Applicant is outlined in the main judgment.

Issues before the CCC

[38] We do not, with respect, agree with the main judgment that the question at issue is the validity of the resolutions undertaken by the shareholders of North West FM. It is important to stress that the validity of this agreement is one to be determined based on the Company Laws of South Africa and the CCC does not have the jurisdiction to hear such matter. The parties have approached the High Court in this regard.

[39] The CCC's mandate arises from Section 17A of the ICASA Act⁵. Of significance to this case, it has jurisdiction to hear matters where there is an allegation of a non-compliance of license conditions as resulting from a Section 64 ECA contravention.

[40] It is important to reiterate the two relevant objectives enacted in Section 2 of the ECA before we proceed:

⁴ Section 6 of the Regulations outlines the procedures to be dealt with in urgent matters.

⁵ Section 17A of the ICASA Act creates the establishment of the CCC. Section 17 B- E speaks to the CCC's functions and powers.

"2. The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—

(h) promote the broad based economic empowerment of historically disadvantaged persons, including black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;

(w) ensure that broadcasting services are effectively controlled by South Africans."

[41] The primary issue in argument before us was one of jurisdiction. It was agreed that once the CCC decides upon whether it has jurisdiction to hear this case, and if it was found that the CCC did in fact have jurisdiction, a hearing on the merits would follow in due course. Accordingly, the merits were not argued before us at this hearing.

[42] The first Respondent contended that the complaint was not properly formulated because it, being a shareholder in North West FM, was not a licensee. The first Respondent argued that as Section 64 of the ECA speaks to contraventions of a licensee and thus the CCC did not have jurisdiction to hear any matter that was cited against the First Respondent or the other shareholders who are not licensees.

[43] We acknowledge that the complexity in this case is that the Applicant's complaint was not only brought against the shareholders of North West FM but against North West FM itself. North West FM is the holder of the broadcast licence. The Applicant is also a shareholder of North West FM.

[44] Thus our interpretation is that any complaint of a section 64 ECA contravention brought against the licensee, North West FM, would fall within the jurisdiction of the CCC.⁶

⁶ See *Caxton and CTP Publishers and Printers Limited v ICASA and CCC*, North Gauteng High Court SA 2009 where the Court ordered ICASA to "immediately undertake and complete an investigation of ...[a licensee and non licensee] in terms of Section 64, 65 and 66" of the ECA.

[45] As stated, the CCC has not heard the merits of this complaint, as the hearing ended on the question of jurisdiction. The remedies sought by the applicant would have to be assessed in the follow-on hearing on the merits.

[46] With regard to the emphasis the main judgment placed on Mr Mukoma's arguments regarding the investigation process of the CCC and ICASA, we do not find it necessary to express our views on this issue for the present purpose.

[47] We are in agreement with the order of the main judgment that the CCC has the jurisdiction to hear complaints of non-compliance by a licensee, save in respects specifically indicated herein.

[48] It must be stressed that we are in the situation where we would have preferred to have had more time to expand on the approach that we take on this matter, but accept that time constraints prevent this from being done.

Prof. K. Moodaliyar, Ms. N. Maseti, Ms M.Ramokgopa and Ms T. Ramuedzisi concurring.