



COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Hearing: 30/8/2021

Case No: 409/2021

FANI MANGANYE

COMPLAINANT

V

MADIBENG COMMUNITY RADIO

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Ms. Yolisa Kedama - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Xola Mantshintshi-CCC Assessor
Amukelani Vukeya - CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

There was no legal representation for either of the parties.
Mr Fani Manganye appeared on his own behalf as the Complainant.
Mr Nick Motloung, the station manager, appeared on behalf of the Respondent.

JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

- [1] The Complainant is Fani Phanel Manganye who describes himself as a Bakwena-ba-Mogopa Community member. The Respondent is a Community Radio Station in the North West and a sound broadcasting licensee. It was granted and issued with a CLASS BROADCASTING SERVICE LICENCE No. Class/Com/R237/Aug/14 on 6 August 2014, and the licence period was five (5) years from date of signature. The licence, therefore, expired in August 2019. There was no indication on the papers that the licence was ever renewed.
- [2] However, an enquiry to the license division, by the Office of the CCC, regarding the status of the Respondent, revealed the following:
- 2.1 A renewal licence application was made and dated 26 August 2019, according to the Commissioner of Oaths' date stamp.
 - 2.2 The Authority received the renewal application on 2 September 2019. This was almost a month after the licence expiry date, which was on 5 August 2019.
 - 2.3 In other words, Madibeng filed its renewal application a month after its licence had expired.
 - 2.4 The Licensing Division accepted the Applicant's renewal application because it was submitted within the 30 days period which the Authority affords to Licensees who submit their renewal application after their licence expiry date.
 - 2.5 On 9 September 2019, an acknowledgment letter was sent to the Applicant and he was also advised to submit a soft copy.
 - 2.6 The Applicant submitted the soft copy as requested.
 - 2.7 On 21 April 2021, the Licensing Officer was allocated the Applicant's renewal application.

2.8 On 22 April 2021, the Applicant was requested to submit information in relation to regulation 7 of the Community Broadcasting Services Regulations, 2019.

2.9 The renewal application was approved on 10 June 2021 and is dated 28 June 2021. It shall expire on 5 August 2026.

[3] In these proceedings I shall refer to Mr Manganye as the Complainant or Manganye and to the radio station as Madibeng FM or the Respondent.

THE COMPLAINT

[4] At the heart of the complaint is the allegation that the station manager of Madibeng FM, Mr Nick Motloung, was responsible for broadcasting false damaging statements against the Complainant in his absence namely:-

4.1 that the Complainant was an illegal immigrant from Zimbabwe and, therefore, had no business involving himself in the affairs of the local community.

4.2 that the Complainant had accepted bribes while he was representing the community in negotiations with the local mining company.

CIRCUMSTANCES THAT LED TO THE COMPLAINT

[5] On 4 February 2021, Manganye lodged a complaint with the CCC for investigation in terms of Section 17B(a) of the Independent Communications Authority of South Africa ("ICASA") Act No. 13 of 2000. The Complainant alleged that Madibeng FM contravened Regulations regarding the Code of Conduct for Broadcasting Service Licensees issued in terms of Section 54 of the Electronic Communications Act No 36 of 2005, ("the Regulations").

[6] In particular, the Respondent allegedly contravened Regulation 3(1) - 3(3), 11(2) and 12(1) of the Regulations.

Hereunder, I deal with each in turn.

VIOLENCE AND HATE SPEECH

[7] Violence and Hate speech - Regulation 3(1):-

" Broadcasting service licensees must not broadcast material which, judged within context:

(a) contains violence which does not play an integral role in developing the plot, character or theme of the material as a whole; or

(b) sanctions, promotes or glamourises violence or unlawful conduct."

[8] The Complainant alleged that during an interview, on a slot named "**Tshaba Re Fete**", (broadcast by the Respondent on 4 January 2021 between 3pm and 6pm), Mr Nick Motloug, in his capacity as a Station Manager, also wrongfully accused him of having committed "tender fraud" when he stated:

"In 2018, Mr Manganye received bribes "brown envelope" from the Rhovan PSV while he was a member of Bakwena-ba-Mogopa Task Team."

[9] The Complainant argued that such conduct is unlawful as the interview was broadcast in his absence and that the station manager was promoting violence against him in the community.

[10] Regulation 3(2) states the following:

"Broadcasting service licensees must not broadcast material which, judged within context, sanctions, promotes or glamorises violence or unlawful conduct based on race, national or ethnic origin, colour, religion, gender, sexual orientation, age or mental or physical disability."

[11] The Complainant alleged that the station manager broadcast his personal views during the radio slot. In this regard, the station manager allegedly stated that the Complainant is an illegal immigrant from Zimbabwe and has no right to involve himself in the affairs of the Bakwena Community. He is alleged to have further said that the Complainant is not a "Mokwena". So, the community must not allow him to assume any leadership position in the Bakwena Community.

[12] In his papers the Complainant argued that the station manager's remarks which were both xenophobic and homophobic served to promote violence and other unlawful conduct against him. (I pause to state that during the proceedings it transpired that the Complainant had not meant to state that the station manager's remarks were also homophobic. He had included the word as he had mistakenly thought that xenophobic and homophobic were the same thing).

[13] He stated further that after the broadcast that he was an illegal immigrant and that he had been involved in bribery, some members of the community had threatened to burn his house down.

[14] Regulation 3(3) states the following:

"Broadcasting service licensees must not broadcast material which, judged within context, amount to

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.”

[15] The Complainant submitted that Motlounge abused his position as a station manager by broadcasting content advocating hatred and inciting violence against him. In so doing, Motlounge put his life and that of his family in danger, it was submitted.

COMMENT

[16] Regulation 11(2) states the following:

“Comment must be an honest expression of opinion and must be presented in such manner that it appears to be comment and must be made on facts truly stated or fairly indicated and referred to.”

[17] The Complainant alleged that the Respondent broadcast the station manager’s biased and untruthful comment during the radio interview mentioned above, thereby contravening Regulation 11(2) and 12(1).

CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE

[18] Regulation 12(1)

“In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot.”

THE RESPONDENT'S RESPONSE

[19] Moltloun denied the allegations against the Respondent and briefly set out the circumstances which led to the alleged contravention.

[20] On the 4 January 2021, he had occasion to host the show, "**Tshaba Re Fete**", on Madibeng FM. He was standing in for a volunteer presenter who was off duty for the day. The discussion that afternoon concerned Bakwena Projects and one of the guests on the show, was Mohau, a Youth member from Bakwena Ba Mogopa. Mohau mentioned, amongst others, Manganye, as one of the people who engaged with the youth in Bakwena Projects.

[21] During the course of the show an opportunity was given to listeners to call and give their input. It was during such an occasion that some callers from Bakwena villages mentioned that Manganye ought to

"excuse himself from the Bakwena Ba Mogopa Tribe matters".

[22] Motloun denied that he insulted the Complainant or said anything about his origins. He also denied that he failed to give the Complainant an opportunity to respond. On the contrary he did give Manganye such an opportunity, albeit on a later occasion. On that occasion, however, he, the Complainant, avoided answering questions that he was asked.

[23] Regarding the allegation that the Complainant had accepted bribes in a brown envelope, Motloun stated that the Complainant had, a few years back "on the first show" confirmed that the mine gave them stipends when he was sent to represent the community concerning their (the community's) demands from the mine.

- [24] Motloun stated that he was prepared to grant the Complainant an “exclusive time slot” on the show in which he could respond to the allegations.
- [25] In his reply, the Complainant was adamant that Motloun had referred to him as a Zimbabwean who was in this country illegally.
- [26] On the role that he allegedly played in the alleged bribery, the Complainant stated that Motloun was spreading propaganda to satisfy his deep seated desire to incite the community against him as he hated him with passion. The Complainant was concerned that Motloun had repeatedly accused him of having committed bribery but had not opened a criminal case against him with the police. Instead he had chosen to broadcast the lie that he had accepted a bribe and was involved in corruption with Glencore Rhovan Mining Operation. As a result Motloun had denied him an opportunity to clear his name in a court of law.
- [27] Furthermore, the Complainant was of the view that Motloun had made up his mind about this alleged guilt. For that reason the Complainant declined the offer to give his side of the story during the “exclusive time slot” that was being made available to him.

THE POSITION OF MADIBENG FM AS THE RESPONDENT

- [28] At this stage it is necessary to make a clear distinction between Motloun, the station manager, and Madibeng FM, the Respondent, in this matter and to make an observation that is of some concern to the CCC.
- [29] In terms of the licence granted and issued to the Respondent, the licensee is Madibeng FM while the custodian of the licence is the Board of Directors of the station.
- [30] While the station manager sees to the day to day running of the affairs of the radio station, it is ultimately the Board which is accountable to the community. As the highest authority in a community radio station, the Board of Madibeng

FM is expected, inter alia, to provide leadership and monitor the station's operations appropriately and effectively. In cases where there is an allegation of serious non compliance, such as is the case in this matter, this ought to be of great concern to the Board.

[31] No such concern has been demonstrated in this matter. I say this because when Motloung was asked if the Board knew of the present proceedings and of Madibeng's appearance before the CCC, his response was that the Board was aware and had informed him that he should go ahead and represent the Respondent at the hearing.

[32] I pause to state that the CCC was unable to verify this information. It, however, found the state of affairs quite disturbing. The fact that there was no word from the Board concerning the matter, spoke volumes about its lack of leadership. This is an indictment on the Board and is unsettling for a number of reasons.

[33] The nature and the seriousness of the alleged non compliance, is such that it should have attracted the attention of the Board. A diligent Board would have promptly investigated the matter while distancing itself from the unfortunate incident. Lastly, the Board would have appointed someone else to represent the Respondent instead of the alleged culprit. Such action would have dealt swiftly with a possible conflict of interest while also registering the Board's displeasure with the incident.

[34] Failure by the Board to take resolute action in this regard is akin to dereliction of duty, in my view.

ICASA CODE OF CONDUCT FOR BROADCASTING SERVICE LICENSEES 2009

[35] Regulatory policies and Code of Conduct in electronic communications systems and in broadcasting are some of the measures under taken in this country to curb, inter alia, the problem of Hate Speech in the ITC environment.

[36] This is just a fraction of the many attempts by the Legislature to right the wrongs of the past by replacing discriminatory laws with those that recognize that everyone is equal before the law.

[37] The purpose of the Regulations is set out as follows:

"In accordance with Section 54(1) of the Electronic Communications Act (ECA) the Authority hereby sets standards according to which Broadcasting Service Licensees will be monitored by the Authority and adjudicated upon in terms of Section 17A-E of the ICASA Act, subject to Section 54(3) of the ECA.

[38] As can be seen from above the purpose is to enable the Authority to monitor the actions of the licensees according to certain standards. The real challenge, however, is that the 'definitions section' of the Code is silent on what Hate Speech is. The result is that identifying Hate Speech has been made a not-so-easy task for a lay person.

[39] That this is so is clear from Section 16 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), as well as Section 10 of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("Equality Act"). They both prohibit Hate Speech. More importantly, both the Constitution and the Equality Act attempt to define what does constitute Hate Speech.

[40] To determine whether the utterances allegedly made by Motloung amount to "Hate Speech", as recognized by law, it is necessary to examine both the Equality Act and the Constitution.

[41] Section 16 of the Constitution highlights the importance of the right to freedom of expression and then spells out its limitations.

Section 16(1) reads:

"Everyone has a right to freedom of expression, which includes -

- (a) freedom of the press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) ...*
- (d) ...”*

Section 16(2) provides that the right of freedom of expression does not extend to

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

[42] Section 10 of the Equality Act deals with the Prohibition of Hate Speech as follows:

“(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to:-

- (a) be hurtful;*
- (b) be harmful or to incite harm;*
- (c) promote or propagate hatred.*

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21, 2 (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

[43] There is no doubt that the Constitution recognizes the importance of the right to freedom of speech. Like all rights, however, freedom of speech is not a right without limitations. This raises a special challenge when Section 10 of the Equality Act is compared to section 16 of the Constitution.

[44] In *John Qwelane vs SAHRC and other* (decided 20 November 2019), the issue was what determines something as freedom of speech versus what determines something as Hate Speech. Journalist Jon Qwelane had published in the Sunday Sun an article under the caption "*Call me names - but gay is NOT okay.*" Not surprisingly, this invited a backlash from the LGBTI community and from various other individuals and groups who claimed that the article was a clear articulation of hate speech. Using the provisions of section 10 of the Equality Act, the South African Human Rights Commission claimed that the article was in violation of section 16 of the Constitution.

[45] There the SCA decided that the definition of Hate Speech in Section 10 of the Equality Act, was so wide that there was no way of interpreting it in a way that was not at odds with the Constitution. The definition extended far beyond the limitations of the freedom of expression provided for in section 16(2) of the Constitution and in many respects was unclear making it vague and overboard.

[46] The SCA then dismissed the complaint against Qwelane on the basis that Section 10 of the Equality Act was inconsistent with section 16 of the Constitution, invalid and unconstitutional.

[47] The Constitutional Court agreed. It found section 10(1)(a) of the Equality Act to be unconstitutional as the inclusion of the term '*hurtful*' could not be justified. The court, however, found the article to amount to hate speech as it advocated for hatred and was harmful due to its homophobic nature. The disjunctive structure of section 10(1) to the extent it provided for sub sections (a), (b) and (c) was also found to be inconsistent with section 16 of the Constitution. which resulted in the court's reconstruction of the Act.

ANALYSIS OF THE EVIDENCE

[48] At this juncture, it is necessary to point out that there was a good reason why the Code of Conduct for broadcasters was introduced. A broadcasting service is a powerful means of communication which can be used for good or for evil. In my view, one of the reasons for the Code was to protect the public against a broadcaster who might be tempted to misuse this power. Notably broadcasting is a pervasive way of providing news and information. That is why it is important that whatever news or information is relayed to the public is not only correct but is also not used to cause harm.

[49] To determine whether there has been a contravention as alleged, it is important to examine the facts closely and then determine whether the relevant regulations are applicable.

Violence and Hate Speech - Regulation 3(1)

[50] Two statements allegedly broadcast by Madibeng FM were to this effect:

- (1) Manganyi was an illegal foreigner from Zimbabwe and ought not be allowed to occupy a leadership position in local community affairs.
- (2) Manganyi accepted bribes while he was representing the Bakwena-Ba-Mogopa in the negotiations the community had with Rhovan mines.

The Hate Speech Allegation

[51] The question is: Do the above utterances contain violence and /or do they sanction, promote or glamourise violence?

[52] In my view, the answer to both questions must be No. In this case there is no denying that the conduct of the Respondent, through its station manager, had the effect of hurting the Complainant. Stating that a person is an illegal immigrant, who has no business involving himself in the affairs of the local

community, is hurtful and even discriminatory - something that the Equality Act and the Constitution of the Republic of South Africa seek to address.

[53] Interestingly, Mr Motlounge's version was that it was the listening public that called in to suggest that the Complainant should step down from his position of leadership as he was not a member of Bakwena Ba Mogopa. That may be so. However, the debate by certain callers cannot be viewed in isolation. The transcripts from the broadcast, which was translated from Tswana to English, do nothing to exonerate Motlounge. And even if we were to accept Mr Motlounge's protestations that he was blameless, his defence would still not assist him when the incident is placed in its proper perspective.

[54] While it may not have been Motlounge who initiated the discussion, it is obvious that he did nothing to steer the discussion away from the direction it was heading. Whether it was intentional or not the station manager failed to protect the Complainant but instead stoked the fire with his line of questions. It was his show and he was in charge. Yet he sought to create the impression that he was helpless and could do nothing to stop the callers from attacking the character of the Complainant on air.

[55] What was said about the Complainant on the 4 January 2021 at the **Tshaba Re Fete** program clearly created a hostile environment.

But not every hostile or even harmful statement qualifies as Hate Speech in the sense envisaged in Section 16(2) of the Constitution (see the matter of **SAHRC on behalf of the Jewish Board of Deputies v Bongani Masuku** handed down in December 2018 by the SCA).

[56] In the present case an allegation that Manganye was a Zimbabwean who was in this country illegally and who had no business being a leader in the Bakwena Ba Mogopa community, is not Hate Speech in terms of Section 16 of the Constitution. Even insensitive or abusive statements may not always amount to Hate Speech. I say this because the Constitution takes into account the importance of protecting the freedom of speech.

The Bribery Allegation

[57] The allegation that Manganye was involved in bribery was no doubt harmful but is outside the scope of the functions of the CCC. Manganye is free to take this part of the complaint to the High Court or another forum which is empowered to deal with matters of this nature.

Comment

[58] The issue that the CCC can effectively deal with is the issue of a comment that was made in the absence of the Complainant. Of course he was given an opportunity later the same day to reply to the allegations but said that the opportunity did not serve its purpose as Motlounge interrupted him continuously and the discussion ended in a stalemate.

[59] Mr Motlounge did not deny the allegation above. Instead, he sought to justify the interruption on his part. His version was that while on the show, the Complainant had repeatedly refused to answer certain questions put to him. This gives the impression that Motlounge saw fit to treat the Complainant as an accused person while he, Motlounge, appointed himself as judge during the programme.

[60] Motlounge also sought to justify his statement that the Complainant was involved in bribery when he stated that on an earlier show the Complainant had admitted the allegations, when he said he had received a stipend from the mine. My view is that referring to a stipend as a bribe is mischief, to put it mildly. An insincere comment by a broadcaster is a contravention of the Code. This is to be found in Regulation 11(2) which states:

"Comment must be an honest expression of opinion and must be presented in such a manner that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to."

Controversial Issues of Public Importance

[61] Regulation 12 states the following:

"12 Controversial issues of public importance

(1) In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to fairly present opposing points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time of the original broadcast and within substantially the same time slot."

[62] Mr Motlounge's comment about the Complainant's involvement in the alleged bribery, has to be examined in the light of the above regulations. Equating a bribe to a stipend, cannot be said to be 'an honest expression of opinion,' in my view. In addition, it certainly cannot be fair or accurate as the statement is not based on fact.

[63] The subject under discussion was clearly a controversial one. It was also of public importance as demonstrated by responses from a number of listeners, some of whom expressed strong views about the fact that the Complainant should step down from his leadership position as a member of Bakwena Ba Mogopa community. That, in itself, should have served as a red flag to Motlounge - something that should have warranted his immediate intervention. Sadly, it did not.

More importantly, Motlounge failed to timeously take steps to protect the Complainant.

CONCLUSION

[64] Words are powerful. They can be used as tools to build or as weapons of destruction. In the broadcasting environment, words wrongly used can have a devastating effect. In the present case we may not know what motivated Motloug's conduct. What is certain is that the broadcast about Manganye in his absence did not sit well with him and he had a reason to feel aggrieved.

FINDING

[65] Having considered the totality of the evidence, the CCC makes the following finding:

65.1 The allegation that the Respondent contravened Regulations 3(1) - 3(3) is not upheld.

65.2 The allegation that the Respondent contravened Regulation 11(2) is upheld.

65.3 The allegation that the Respondent contravened Regulation 12(1) is upheld.

ORDER

[66] The following order is recommended to ICASA:

66.1 That the Respondent be directed to desist from further contravening Regulation 11(2) and Regulation 12(1) regarding the Code of Conduct for Broadcasting Service Licensees issued in terms of section 54 of the Electronic Communications Act 36 of 2005.

66.2 That the Respondent be directed to take the following remedial action:

66.2.1 That the Respondent issue an apology to the Complainant and that such apology be broadcast once during the Tshaba Re Fete programme, within 14 days after ICASA has published its findings and order.

66.2.2 That the Respondent issue a statement daily over a period of five (5) consecutive days, distancing itself from any form of Xenophobia and the conduct of Mr Motloun and that such statement be broadcast once during the same programme mentioned in paragraph 66.2.1 above, within 14 days after ICASA has published its findings and order.

66.1 That the Respondent be directed to take the following remedial action:

66.1.1 That the Respondent issue an apology to the Complainant and that such apology be broadcast once during the Tshaba Re Fete programme, within 14 days after ICASA has published its findings and order.

66.1.2 That the Respondent issue a statement distancing itself from the conduct of Mr Motloun and that such statement be broadcast once during the same programme mentioned in paragraph 66.3.1 above, within 14 days after ICASA has published its findings and order.

TMMasipa

Judge Thokozile Masipa
Chairperson of the CCC