COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 16 September **CASE NUMBER 209/2016**

IN RE: SOUTH AFRICAN BROADCASTING CORPORATION LTD (GOOD HOPE FM)

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jack Tlokana
Ms Mapato Ramokgopa

From the SABC: Mr P Moilwa (General Manager: Policy and Regulatory Affairs) Ms N Monyela (Manager: Policy and Regulatory Affairs), Mr N Shibambo (Acting Manager: Regulatory Compliance), Mr A Matthee (Commercial Enterprises) and Mr Stephen Harrigan (Engineering)
From Broadcasting Compliance ICASA: Ms Fikile Hlongwane (Manager) Coordinator: Ms Lindisa Mabulu

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JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1]Good Hope FM is one of the radio broadcasters of the South African Broadcasting Corporation. For ease of reference we will refer to the respondent

[1] An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000.The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

as Good Hope FM. Two election broadcasts of Good Hope FM were referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA. Good Hope FM had, allegedly in conflict with regulation 4(15) of the *Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters in Respect of Municipal Elections Broadcasting* (as amended), broadcast a political advertisement ("PA") of the African National Congress which was, immediately, followed by a party election broadcast ("PEB") of the Democratic Alliance. The first lasted 30 seconds and the latter one minute. Regulation 4(15) provides as follows:

"A Broadcasting licensee must not transit a PEB immediately before or after another PEB or immediately before or after a PA."

[2] In terms of section 56 of the Electronic Communications Act 2005 ("ECA") a PEB and a PA may only be broadcast during an election period. An "election period" is defined by the ECA as "the period commencing with the date on which the election is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected." PA's and PEB's may, however, in accordance with section 57 of the ECA, only be broadcast from the day on which an election is proclaimed up to 48 hours prior to the polling period commences – which, in this case, was at 07:00 on the 3rd of August 2016. The election on 3 August 2016 was proclaimed in the *Government Gazette* by the Minister of Cooperative Governance and Traditional Affairs, Mr D van Rooyen, on 23 May 2016 after he had signed the notice on 22 May 2016 in terms of the Local Government: Municipal Structures Act 1998.

[3] There was no contravention of section 56 read with section 57. The question is, however, whether the above mentioned regulation 4(15) had been contravened.

MERITS OF THE DEFENCE

[4] After having been informed of the alleged contraventions by the Broadcasting Compliance Unit at ICASA, the SABC responded that, although the two items were not initially scheduled to be broadcast directly after each other,

it conceded that the broadcasts did take place as alleged, but that it took place as a result of the following circumstances:

"The incident coincided with a major upgrade of the station's main broadcast studio. On the day in question the station moved from their main studio to a temporary facility and this entailed moving the hardware of the station's play-out station to a temporary studio. The initial move went well but subsequent technical problems resulted in the play-out system going off-air, and it was at this time when the scheduled items were "lost". What followed was a scramble to get the play-out system back on air and to recover the "lost" scheduled items. In the rush to get the system back on air, the complier failed to pick up (that) the PA and PEB were back to back due to the labelling of the items on the system. In specific terms the PA was labelled ANC and the items TV Airtime Sales. This contributed to the error when the items were rescheduled under duress (*read*: pressure)."

Copies of the broadcasting schedule, made available to the CCC, showed that the planned schedule indeed had an intervening advertisement of Shoprite Checkers.

[5] The defence set out in the previous paragraph could amount to a defence of impossibility of performance, which is a defence in our law.[2] Compare the incisive analysis of impossibility as a defence by Judge Van Zyl in *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C). The learned Judge, inter alia, stated as follows:

In criminal law the maxim *lex non cogit ad impossibilia rather* than *impossibilium nulla obligatio est* has featured prominently. It has usually occurred where an Act of Parliament or similar statutory enactment has demanded compliance, under appropriate circumstances, with an obligation or some other form of positive conduct. If such obligations or conduct should be objectively impossible and not have been caused by the person pleading impossibility, the maxim may be applicable.

This has been the approach in a number of South African cases. See R v Mostert 1915 CPD 266 (impossible to give a stamped receipt in terms of s 18(3)(b) of Act 30 of 1911); R v De Jager 1917 CPD 558 (impossible to procure a taximeter as required by reg 706 of the Cape Town Municipal Regulations framed under Ordinance 10 of 1912); R v Harris 1919 CPD 216 (impossible to obtain a hydrometer for establishing whether water has been added to brandy

[2] Compare the CCC judgment in *Nowmedia v SAPO* (Case 126/2015)

in contravention of s 8 of Act 15 of 1913); Jetha v Rex 1929 NPD 91 (impossible to attend a meeting of creditors in terms of s 142(a) of Act 32 of 1916); S v Mafu 1966 (2) SA 240 (E) (impossible to comply with curfew regulations contained in Proclamation 194 of 1934); S v Moeng 1977 (3) SA 986 (O) (impossible to obtain a 'passbook' in accordance C with s 15(1)(a)(i) and (ii) of Act 67 of 1952 as amended)...

In a number of other cases the maxim was considered, expressly or by implication, but held not to be applicable. See R v Close Settlement Corporation Ltd 1922 AD 294; R v Korsten 1927 NPD 12; Attorney-General v Grieve 1934 CPD 187; R v Hoko 1941 SR 211; R v Hargovan and Another 1948 (1) SA 764 (A); R v Adcock 1948 (2) SA 818 (C); R v Canestra 1951 (2) SA 317 (A); S v Block 1967 (4) SA 313 (C); S v Leeuw 1975 (1) SA 439 (O); S v Concalves 1975 (2) SA 51 (T)…

'Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, Lex non cogit ad impossibilia, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse.'

[6] From the above analysis of the law and from further case law quoted by Judge Van Zyl it is clear that full details must be provided of the facts on which the alleged impossibility is based. Although details were not provided, a clear picture was sketched and, within the circumstances, one could argue, as the SABC did, that circumstances outside the control of Good Hope FM intervened. The play-out system went off-air and a “scramble” followed to get it on-air again. On a close analysis of the case law, we have come to the conclusion that the defence of impossibility would not quite fit these facts. We would have needed more facts as to why the system went off-air – for example in an affidavit by a technician.

[7]The second question is, however, whether there was negligence on the side of Good Hope FM. This is so since, even if there had objectively been a contravention of the said regulation, the legal question remains whether the radio station had been negligent. This legally *implied* requirement of negligence is discussed in the following paragraph.

[8] The approach was described as follows in *S v Arenstein* 1964 (1) SA 361 (A) at 365C-D:

The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not

to have intended innocent violations thereof to be punishable. (*R v H* 1944 AD 121 at 125, 126; *R v Wallendorf and Others* 1920 AD 383 at 394.) Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (R v H (supra at 126).)' [3]

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP:* [4]

[86] The general rule of our common law is that criminal liability does not attach if there is no fault or blameworthy state of mind. This is expressed by the maxim: *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is a guilty mind). The fault element may take the form of either intention or negligence. This is true of both common law and statutory offences. (Footnotes omitted)

Also Justice Cameron (with whom four other Justices of the Constitutional Court concurred) stated as follows in *Democratic Alliance v African National Congress:*

[154] a further issue needs to be addressed. This also follows from the ground rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted 'false information'. This means that, in law, the author acted innocently. And the requirement of a guilty mind 'is not an incidental aspect of our law relating to crime and punishment, it lies at its heart'. *Strict criminal liability is therefore not easily countenanced. There is thus an interpretative presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are 'clear and convincing indications to the contrary*.[5] (Emphasis added and footnotes omitted)

[9] There are no indications, as set out above, than an innocent violation of the regulation would also amount to a contravention in law. Ultimately, the question is, accordingly, whether the radio station was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case the relevant compiler, *should* have known that the two political features would, in the suddenly changed circumstances described above, follow directly upon each other.

[10] That the particular circumstances of each case must be considered in establishing whether there had been negligence has, once again, recently been

[3] See further *S v Qumbella* 1966 (4) SA 356 (A) at 364D-G; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H-611A; *S v De Blom* 1977 (3) SA 513 (A) at 532B-D.

[4] 2014 (5) SA 317 (CC).

[5] 2015(2) SA 232(CC).

applied by our Constitutional Court and by the Supreme Court of Appeal in two matters. In the one instance[6] negligence was found to have been established and in the other instance that it was not established.[7]

FINDING

[11] There is no doubt that a mistake had been made. However, a reasonable compiler could, in the same urgent circumstances, have made the same error. In the result the CCC finds that the radio station was not negligent in having broadcast the two items directly after each other. There was, accordingly, no contravention of Regulation 4(15) of the *Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters in Respect of Municipal Elections Broadcasting.*

JCW van Rooyen SC 17 October 2016
Chairperson of the CCC.

[6] *Lourens & Others v Imvula Quality Protection (Pty) Ltd* 2014(3) SA 83(CC) per van der Westhuizen J, writing for an unanimous Court; also compare *Oppelt v Depatment of Health, Western Cape* 2016(1) SA 325(CC).

[7] *Buthelezi v Ndaba* 2013(5) SA 437(SCA) per Brand JA, writing for an unanimous Court.