

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 30 October 2019

Case Number 362/2019

IN RE: DELTA CHRISTIAN CENTRE (“HOPE FM”)

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)
Councillor Nomonde Gongxeka-Seopa
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Mr Jack Tlokana

On behalf of Delta Christian Centre: Mr Motseki Mabuya (Station Manager) and Mr Anthony Hearn (Chairperson)

From the CCA: Ms Busisiwe Mashigo (Manager: Broadcasting Compliance)

Also present: Mr Ntapeleng Sepapu Moteka (Former Station Manager)

From the Coordinator’s Office: Ms Meera Lalla
Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW van Rooyen

[1] Hope FM (formal name: Delta Christian Centre) has filed a complaint with the CCC Coordinator against the Compliance and Consumer Affairs at ICASA. Since it is the Chairperson of the Complaints and Compliance Committee’s task in terms of section 17(6) of the ICASA Act to convene a meeting of the Committee, the Coordinator referred this matter to the undersigned. The practice is that the Chair refers a complaint to the CCC, after consultation with the Coordinator. This is done when the CCC has jurisdiction and a *prima facie*

¹ The CCC is an independent administrative Tribunal in terms of section 33 of the Constitution of the Republic of South Africa. It was constituted by ICASA in March 2007 in terms of section 17A of the ICASA Act 2000, as amended in 2005. Its task under the ICASA Act is to advise the Council of ICASA as to an order or a *recommendation to the Authority necessary or incidental to the performance of the functions of the Authority in terms of this Act or the underlying statutes; or (ii) achieving the objects of this Act and the underlying statutes.*

case has been made out. Furthermore, as Malan J (later a Judge of the Supreme Court of Appeal) pointed out in *SA Jewish Board of Deputies v Sutherland NO*² fairness and the gravity of the issue might require that a hearing takes place, even where a *prima facie* case has not been made out.

[2] Although it is unusual for a Complaint to be filed against a Division of ICASA, it is clear from section 17B of the ICASA Act that a *complaint* may be filed against any person or entity, including a Division of ICASA. It is, however, also clear from section 17B that the advice which, in such a case, is provided to the Council of ICASA would relate to a recommendation as to its functions. Section 17B provides as follows:

17B. Functions of Complaints and Compliance Committee

The Complaints and Compliance Committee -

- (a) must investigate, and hear if appropriate, and make a finding on -
 - (i) all matters referred to it by the Authority;
 - (ii) complaints received by it; and
 - (iii) allegations of non-compliance with this Act or the underlying statutes received by it; and
- (b) *may make any recommendation to the Authority necessary or incidental to -*
 - (i) *the performance of the functions of the Authority in terms of this Act or the underlying statutes; or*
 - (ii) *achieving the objects of this Act and the underlying statutes.* (Emphasis added)

[3] It is informative that section 17B grants jurisdiction to the CCC to investigate, and hear if appropriate, and make a finding on “complaints received by it.” The absence of the word “licensee” as in section 17C is notable and cannot be ignored. Whilst this may indeed include the issuing of an order against a licensee, the present matter can obviously not go in the direction of *orders* against ICASA or a division of ICASA. It is intended to be an *advisory* as to procedure and functions and the addressing of the position of the licensee in a fitting manner. What is important is also the fact that a complainant is granted a hearing before the CCC in matters which justify a hearing, as set out above. The CCC’s advice to Council also takes the section 16 Constitutional right of the radio listeners to be informed into consideration. Of course this right, as most other fundamental rights in the Constitution of the Republic of South Africa, has

² 2004 (4) SA 368 (W) at para [33] and [34]. A matter relating to the Broadcasting Monitoring Complaints Committee, which was the broadcasting complaints committee of the IBA and thereafter of ICASA up to 19 July 2006.

reasonable limitations. Yet it is important in the present case that the community should not be prejudiced as to the self-withdrawal or removal of one of its free sources of information. On the other hand, the community should also support the radio station so as to ensure that it can afford to pay its costs. Profit, which is distributed amongst shareholders is not permissible for a community broadcaster. It is, thus, dependant on grants and income from advertisements.

[4] ICASA would, with respect, only be in a position to close down a broadcaster if advised to do so by the CCC or by an order of a Court. It would, in the CCC's respectful opinion, amount to "taking the law into one's hands," to close a station down without an advice to Council by the CCC (after a hearing) or a Court order. There are, in fact, three recent judgments by the Constitutional Court which accentuate that the law may not be taken into one's hands.³ Of course, the Court recognises that certain administrative actions may be taken without intervention of a Court. But taking a broadcaster off air, would most definitely not qualify. It would be different where an application to renew has been turned down by ICASA. In such a case the remedy for the past licensee would lie in applying to the High Court for a review. There are, of course, instances where the ICASA Inspectors take possession or seal unlawful equipment.⁴ However, the Inspector Regulations of ICASA 2010, explicitly provide that an Inspector must act *reasonably*.⁵ Whatever the position may be otherwise and according to the ECA, where the community's contact with a broadcaster is ended by an Inspector, the authority to cut off a community from its radio station *without* a Court order (where *audi alteram partem* is applied) or a decision by Council on the advice of the CCC would be unconstitutional. Whatever the ECA provides as to the powers of Inspectors, ending a broadcast must be cleared beforehand

³ See *Genesis Medical Aid Scheme v Registrar, Medical Schemes* 2017 (6) SA 1 (CC) at para " [112] A similar situation arose in *Kirland* where an invalid approval to establish a private hospital was granted. This court rejected argument by the MEC for Health to the effect that the invalid approval had no legal effect. There Cameron J stated:

'By corollary, the department's argument entails that administrators can, without recourse to legal proceedings, disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken. This is a licence to self-help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public. And it would undermine the courts' supervision of the administration. ' "

⁴ See section 32 of the Electronic Communications Act.

⁵ Where a person is in contravention of section 32(1) of the ECA, the inspector must take that course of action, as specified in section 32(3)(a) or (b) of the ECA, as is *reasonable* in the circumstances to ensure that the apparatus is not continued to be possessed in contravention of section 32(1) of the ECA.(Emphasis added)

after a proper hearing by the CCC or a Court. Reasonable notice must also be given to the Radio Station so that it may inform its listeners that they will lose the services of its radio station. Section 39 of the Constitution of the RSA makes it obligatory to read legislation through the prism of the Constitution, which guarantees the basic rule of *hearing* interested parties before a decision is taken which is likely to prejudice them. Of course, there are instances where necessity would be a defence. For example, during the Soccer World Cup one of ICASA's inspectors cut off the radio signal of a foreign radio or TV signal, when it was affecting the landing of an aeroplane at Oliver Tambo Airport. Of course, that was justified by the defence of necessity. There are, of course, also other instances – but, where a service to the public will be interrupted and there is no immediacy for switching off a signal, steps must be taken to ensure fairness as set out above. Given our history where the vast majority of our People were wracked⁶ by apartheid, the right to be heard and fairness are crucial and must be read into the legislation in terms of section 39 of the Constitution, insofar as the switching off of a public service, like broadcasting, is concerned.

[5] It should be mentioned that Delta Christian Centre had, under a misapprehension of the law, appointed as a transferee Delta Christian Centre (YB20), which commenced broadcasting under the license illegitimately. There were four contenders including the former presenters. The station manager of YB20 in fact lodged a complaint, having heard from ICASA that the transfer was invalid if not approved by ICASA beforehand. Since the issue before the CCC, in essence, relates to the question what Delta Christian Centre should now do, it is not necessary to set out the details of the station manager's complaint before the CCC. The core question is whether ICASA is not, in the circumstances, entitled to switch off the broadcast. The main point made by ICASA is that Delta Christian Centre (Hope FM) had not obtained the Authority's permission to transfer the licence and furthermore, it had not filed the necessary application. Delta Christian Centre, in any case, informed the CCC that it was no longer its intention to apply for a transfer of its licence to YB20 and asked for more time.

AFFIDAVIT BY DELTA CHRISTIAN CENTRE

[6] Mr Anthony Hearn, who was present at the hearing, filed the following affidavit which sets out the facts.

⁶ Abraham Lincoln in his Gettysburg Address on 19 November 1863, commemorating the sacrifice of those from both sides who died at the Battle of Gettysburg during the American Civil War. See Shapiro *The Yale Book of Quotations* (Yale University Press 2006) at 463. Also see Wallis AJ in *Kham v EC* 2016 (2) SA 338 (CC). Since the Address was not written, some versions do not include the word "wrack." Nevertheless, the word "wracked" is, in the undersigned's view, the most fitting word.

I, Anthony Michael Hearn declare that I am the elected chairperson of the company Hweletsa Hope FM ("HFM") and that I am functioning as the authorised representative of the Delta Christian Centre ("DCC") as the licensee authorised by the licences issued by the Independent Communications Authority of South Africa ("ICASA"). The management of these licences is carried out by the company HFM.

DCC is the licensee of the following broadcasting licences issued by ICASA:

- [1] **CLASS BROADCASTING SERVICE LICENCE** – No Class/Re/Com/R163/Aug/16
- [2] **RADIO FREQUENCY SPECTRUM LICENCE** – No. Class/Re/Com/RF163/Sept/16

The licences are granted and issued in terms of the Electronic Communications Act 36 of 2005 (as amended) ("ECA"). Reference to "licence" in the narrative that follows refers to both documents noted above.

[3] In terms of the licence, control of the licence vests in the Board of Directors of the DCC.

[4] The DCC is a benevolent organisation registered as a non-profit company in terms of the Companies Act 71 of 2008 ("**Companies Act**") with a registration no 2006/000058/08. The DCC is controlled by an independent Board of Directors.

[5] The DCC controls registered non-profit companies' performing the unique benevolent activities that the DCC operates within the community of the Vaal Triangle. Each of these subsidiary companies is registered as an independent operating entity in terms of the Companies Act. Each of these operating entities is controlled by their own Board of Directors that is accountable to the Board of Directors of the DCC.

[6] HFM is one such subsidiary company of the DCC. The company HFM is noted by ICASA in the Broadcasting Service Licence as the Station. This company HFM has registration no. 2010/008781/08.

[7] In respect of the operation of the company HFM as the broadcaster for the DCC of the company HFM was operated under the auspices of an independent Board of Directors ("BoD") that is accountable to the DCC Board of Directors.

[8] Resulting from the restricted financial resources of the company HFM, the DCC subsidised the operating costs of the broadcasting activity in respect of, inter alia i) telephones ii) the internet connection and operating costs thereof, for the commercial activities and live streaming, iii) the utility costs in respect of electricity and water, iv) the refreshment cost for the guests and volunteer staff, and v) all the ad hoc operating costs as a result of maintaining the broadcasting activity on the DCC premises.

[9] The liability incurred by the company HFM as a result of the transmission cost levied by Sentech continued to accumulate on a monthly basis. The company HFM was never in a liquid enough position so as to service this cost and maintain the indebtedness to Sentech at manageable levels. Note was taken by the BoD of the discussions, and perceptible commitments by various governmental structures of the prospect of having the transmission costs liquidated in the form of a subsidy to the community radio broadcasters.

[10] The Companies Act notes that in section 22, "Reckless trading prohibited". In particular, section 22(1)(b) of the noted Act addressing the prohibition of trading under insolvent circumstances. As a result of the accumulation of the Sentech indebtedness the company HFM was potentially trading recklessly and this perceptible non-compliance had to be addressed urgently.

[11] In a continuous attempt to quantify and control the Sentech debt, the company HFM sent

regular correspondence to Sentech acknowledging the debt and requesting information on the current status of the account. The last correspondence was addressed to them on 8 April 2019, requesting a statement of account. To date nothing has been received.

[12]It must also be noted that there were instances where a portion of the accumulated Sentech indebtedness was liquidated by external public structures, but the instances were erratic and could not be relied on as a constant source of revenue that would liquidate the Sentech indebtedness in its entirety.

[13]The company HFM was also in potential delict with respect to sections 4(1)(a) and 4(1)(b)(i) of the Companies Act by not satisfying the solvency and liquidity test. I must however, emphasise that the company HFM never had the intention to defraud any legitimate creditors and the cessation of the broadcasting activities was not a means of escaping the liability for the accumulated indebtedness but an attempt to limit the accrual resulting in the increase of the indebtedness.

[14]It would have been irresponsible of the DCC to continue channelling donated funds to an unsustainable and ineffective company that was not achieving the original vision. The situation was the case of HFM.

[15]The financial state of affairs noted previously is clearly evident in the Audited Financial Statements for the year ended February 2018. The financial risk was noted by me to the BoD of the company HFM a number of times in the preceding twelve month period which initiated much discussions but no concrete action. My incessant nagging on this subject as a member of the BoD of the company HFM was followed by the resignation of the then serving chairperson.

[16]On the resignation of the then serving chairperson I was voted in to serve as interim chairperson of the BoD. It must be noted that the company HFM has not been liquidated subsequent to the original, in March 2019, termination of the broadcasting activities.

[17]In respect of the capital assets of the company HFM, the containers housing the studios and offices are the property of CDD (and not the property of HFM) so they were, subsequent to the broadcasting activities being terminated, allocated to other benevolent activities by the DCC. The broadcasting and associated equipment was originally donated to the company HFM by the Media Development and Diversity Agency ("MDDA") under project 2011/033/CB running in the period August 2012 to July 2013 and November 2013 to March 2015. Apart from the broadcasting equipment, the funding included a portion of the operating costs and a payment to Sentech. In terms of Annexure A: Schedule of write off periods acceptable to SARS contained in Binding General Ruling Nr 7 dated 2 November 2012, Radio Communication Equipment can be written-off over a period of 5 years. Considering that the equipment is more than seven years old, it has been fully depreciated and it's thus of zero value. I am of the opinion that there are no financial resources owed to the MDDA.

[18]The BoD of the DCC resolve don 21 February 2019 to surrender the licence (noted above) to ICASA subsequent to terminating the broadcasting activities. A letter informing me, as the chairperson of the BoD, of the resolution made by the DCC BoD to terminate broadcasting and surrender the licence to ICASA was accepted by me on 21 February 2019.

[19] Although the resolution by the DCC was to surrender the license, an opportunity was given to an individual (the ex-station manager) to continue the broadcasting if an agreement between him and the licensee (the DCC) could be reached. Agreement could not be reached and broadcasting was terminated on 31 March 2019 after three days of an on-air and written announcement of the termination of broadcasting and the reason therefor.

[20]The DCC then completed and submitted an application to ICASA to surrender the licences

noted above to take effect on 1 April 2019. A copy of the documentation is available on request. The application was couriered to ICASA on 30 March 2019 and was signed by Brigitte on 3 April 2019 (confirmation obtained by tracking).

[21]The commercial implications of the surrendering of the licence were discussed in a meeting with a commercial attorney on 98 April 2019 and the decision was made that the company HFM would not be liquidated voluntarily. This implied that all debt remained with the licensee DCC as the holding of HFM.

[22]Subsequent to the termination of the broadcasting activity on 31 March 2019, I was involved in a meeting with representatives of ICASA on 11 April 2019 at the offices of ICASA.

[23]The following decisions was noted at the meeting:

- (a) ICASA would prefer that the licence be transferred to another qualifying entity rather than being surrendered;
- (b) A transfer of the licence to a community of interest (the Christian Community of the Vaal) would be investigated;
- (c) ICASA would issue a directive on who could submit the application for transfer; and
- (d) There was no directive, either verbal or written, in respect of the requirements to continue broadcasting.

[24]It was also noted at the meeting that the forms for the transfer of the licence that had to be completed should be obtained directly from ICASA as the forms available on the website were outdated.

[25]In view of the subsequent occurrences and directives from ICASA, the fact that there was no directive in respect of continuing broadcasting is of importance.

[26]In compliance with the decisions at the meeting of 11 April 2019, an electronic communication was received from ICASA on 17 April 2019 and the communication read as *"The advice we received internally regarding the transfer application that Delta Christian Centre intends to bring before the Authority, Delta Christian Centre has the right to submit the application. However, please note the following: i) The transfer application will be published for public comment or objection, ii) the transfer application is subject to assessment, and iii) the Authority will make the decision on whether to grant the transfer or not."* At this point it must be noted that the licensee, DCC, elected to surrender the licence to ICASA and that the option of transfer was suggested by ICASA themselves and as not an option identified by the DCC.

[27]It was thus confirmed that noted by DCC, that the final decision in respect of the transfer of the licence irrespective of any recommendation made by the licensee rested with ICASA.

[28] In line with the fact that ICASA had noted the preference that the licence be transferred, that there had been no directive from ICASA to recommence broadcasting and had in fact issued the directive noted above, the search for qualified service providers to dismantle and crate the studio equipment of HFM was started by DCC.

[29]In order to ensure that the studio equipment was professionally dismantled and packed in marked boxes, the use of a professional institution was solicited for the task. The activity of dismantling and packing the equipment was completed approximately two weeks after receiving the transfer directive from ICASA, i.e. on about 3 May 2019.

[30] On the basis of the directive (noted above) received from ICASA, the DCC embarked on a process of soliciting interest from parties in the Vaal having an interest in being the recommended transferee (or applicant as referred to in the ICASA documentation). The process of soliciting interest was initiated by an email sent on 18 April 2019 to those parties

that had expressed interest. It must be noted that DCC (the Licensee) started the process of complying with the directive of ICASA a day after receiving it.

[31] There were four parties, the participants, that expressed an interest and that made presentations to a group of directors of the DCC. Particular consideration was given to the following points:

- (1) Would the service be directed to the Community of Interest?
- (2) Would the entity be in a position to continue the broadcasting activity within their established plan for the medium term future?
- (3) Would the entity continue with the conditions of the licence as originally dictated by ICASA?

[32] An aspect that was of additional importance was the function of address and facilitation of community developmental issues within the broadcasting activity.

[33] After completing the process of selecting the directors of the DCC (the licensee) then decided that the recommended transferee (for applicant) would be the company YB20 Leadership. This decision was communicated electronically on 6 May 2019 to all the participants of the selection process.

[34] After finalising the preferred transferee, the option of the company YB20 Leadership accepting the outstanding Sentech indebtedness was noted. ...

[35] The DCC then continued with the process of gathering all the necessary information for the transfer application to be submitted to ICASA.

[36] On 15 May 2019 an email was sent to Ms X Makhoba to access the correct forms and the payment details for the transfer application.

[37] On 16 May 2019 an email was sent to Ms B Shabane requesting forms and payment details.

[38] On 17 May 2019 correspondence was received from the Acting GM: Compliance and Consumer Affairs entitled: ***Contravention of Regulations regarding standard terms and conditions for class licences 2010, as amended***. It was noted in paragraph 3 of this letter that the *"The Authority is aware that the licensee has halted broadcasting activities as outlined in its licence terms and conditions as well as Regulation 6(1) of the Regulations"*. Paragraph 4 of this letter requested DCC to commence broadcasting activities immediately. Note that this was a month after the original directive and more than a month after the original meeting.

[39] On 21 May 2019 an email was sent to Ms B Mashigo which, amongst other issues noted *"...to receive the directive to recommence broadcasting a month after the original directive on the licence transfer was given has placed the DCC in an invidious position that has created a number of serious logistical problems. A suitable transferee has been identified and on receipt of the requisite documents and information from ICASA the application will be completed and the requisite payment made and the documents were remitted to ICASA. Although an official reply to the correspondence noted above (letter from ICASA dated 17 May 2019) will be made, the request is that you, as the regulatory Authority, reconsider and rescind your requirement that Hweletsa Hope FM recommence broadcasting."*

[40] This letter was replied to on 27 May 2019 where it was noted that telephonic communication could not be established and electronic communication to discuss the request made by ICASA in the letter was not replied to by ICASA.

[41] The reply to the letter was concluded with the narrative that *"The receipt of this correspondence (letter dated 17 May 2019 from ICASA) a month after having received a directive from ICASA has created a situation where the licensee is confused as to what*

requirements have to be fulfilled. I would thus appreciate an urgent directive from ICASA that is unambiguous in terms of requirements and timeline bearing in mind that the licensee was in the process of complying with a directive communicated previously." A reply to this letter was received and dated 18 June 2019, hardly urgent!

[42] The correspondence dated 18 June 2019 was received from the GM: Compliance and Consumer Affairs. Paragraph 3 of this correspondence noted *"Delta Christian Centre must note that the intention to submit a transfer application with the Authority does not constitute a reason to stop broadcasting activities."* ICASA seems to have conveniently forgotten that DCC originally applied to surrender the licence and that the transfer option was being followed at their behest. Paragraph 4 of this correspondence from ICASA repeated the request to commence broadcasting activities and failure to do so would result in the Licensee being referred to the Complaints and Compliance Committee ("CCC"). The question remains as to why the threat was not implemented and the fact that the threat was not carried out was construed to be part of the bullying tactic followed up to that point. With this point as reference, an electronic communication was received on 29 August 2019 from the senior manager in the Compliance department stating *"...in the event we refer the matter to the Complaints and Compliance Committee (CCC)..."* which contradicts the statement of *"...would..."* in the letter of 18 June 2019. The word "would" means definitely and "in the event" means if. I took this as being indicative of the indecision of ICASA – the frustration being was that the indecision was at the expense of DCC as the Licensee.

[43] This letter dated 18 June 2019 received from ICASA reiterated the requirement to commence the broadcasting activities and then for HFM to provide proof of the commencement to ICASA by 24 June 2019

[44] Discussion has been initiated with Mr Motseki Mabuya to use the YB20 premises to broadcast on behalf of the licensee DCC. Mr Mabuya would then be appointed as station manager for the company HFM on a contractual basis until ICASA had made a final decision on the transfer of the licence. I as this as the least disruptive option of recommencing the broadcasting to give action to the request of ICASA.

[45] The decision to utilise the YB20 premises to commence broadcasting initiated a decision to finalise a contract with YB20 Leadership ("YB20"). This contract noted, inter alia, specifically i) YB20's compliance with ICASA conditions of the licence, ii) the continuation of the broadcasting activity until ICASA issues a directive subsequent to the transfer of the licence and iii) YB20 will correspond with Sentech in respect of the distribution of the broadcasting signal. The contract was drafted on 13 June 2019 and ratified by the respective parties on 18 and 19 June 2019. A copy of this contract was sent to ICASA on 25 June 2019 who acknowledged receipt in correspondence dated 11 July 2019.

[46] It must be noted that this contract with YB20 did not transfer the broadcasting licence to YB20 and it did not require of YB20 to accept, or transfer the accumulated indebtedness from Sentech to YB20.

[47] On 10 July 2019 (ICASA letter dated 9 July 2019) I received correspondence from ICASA titled – RE: CONTRAVENTION OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 AS AMENDED AND THE COMMUNITY BROADCASTING SERVICES REGULATIONS 2019 that contained factually incorrect information, spelling mistakes and grammatical errors. ...This letter contained a paragraph 4 which reads *"Therefore, YB20 cannot provide broadcasting services as per the ECA because no third party or any other entity may provide broadcasting services other than the entity to which the authority granted and issued the licence was to."*

Also for the first time in the deliberations the issue of community participation was brought up. That same day this correspondence was received, I receive an email noting that letter the should be ignored and disregarded because of editing and typo errors.

[48] On 10 July 2019 (ICASA Letter dated 10 July 2019) I received what was supposedly the corrected version of the letter noted above with the same title RE: CONTRAVENTION OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 AS AMENDED AND THE COMMUNITY BROADCASTING SERVICES REGULATIONS 2019, still containing the factually incorrect information. Paragraph 4 (quoted above) had now been deleted in its entirety. The correspondence contained in Paragraph 4 noted above was then ignored in its totality. The opening statement in the correspondence referred to "Your letter dated 25 June 2019 refers". This created a further sense of confusion to me as I had not addressed a letter dated 25 June 2019 to ICASA. In correspondence sent on 11 July 2019 ICASA apologised for the mistake and confirmed there was in fact no letter dated 25 June 2019 from DCC of HFM. This only added to my state of confusion with the entire process and caused me to believe that ICASA was following their own agenda and that we, as DCC being the Licensee, were not privy to.

[49] This correspondence from ICASA dated 10 July 2019 noted YB20 as 'the intended new licensee', that YV20 '*cannot hold any sound broadcasting licence by a simple handover or transfer to them, of the licence that was awarded and issued to Delta Christian Centre*', and '*to carry out any broadcasting services in the place of the licensee Delta Christian Centre*'. The licence has not been transferred to YB20 and the only reason for getting YB20 involved in the broadcasting activity was in an attempt to comply with the request of ICASA.

[50] Paragraph 8 of this letter dated 10 July 2019 notes the '*...the Authority is of the view that Delta Christian Centre has contravened the Community Broadcasting Services Regulation 2019, by transferring control of its licensed services to YB20 without the Authority's approval. Therefore, the contraventions should be referred to the Complaints and Compliance Committee (CCC) of the Authority for adjudication*'. This begs the question from DCC (the Licensee) of why was it not referred to the CCC?

[51] In a letter dated 11 July 2019 titled RE: CONTRAVENTION OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 AS AMENDED AND THE COMMUNITY BROADCASTING SERVICES REGULATIONS 2019 where ICASA noted that there was in fact no letter dated 25 June 2019 from DCC of HFM but the letter that was being referred to was in fact the management contract that the licensee, through HFM, had concluded with YB20 for the operation of the broadcast as per the requirements of ICASA. It was noted in this letter that "*The Authority is yet to pronounce on the validity of the purported agreement between Hope FM and YB20.*" This statement was interpreted to be that there was not yet an outright rejection of the contract or its terms but here would be feedback from the Authority on the validity of this contract. As yet there has been no definitive correspondence from ICASA in this regard.

[52] The letter dated 11 July 2019 received from ICASA continued by addressing the date issues of the drafting versus signature of the contract. I found the comments nonsensical and ignored them.

[53] On 16 July 2019 I provided a consolidated reply to the ICASA letters dated 10 July 2019 and 11 July 2019. This reply reinforced the following points (which had all been noted in previous correspondence):

- (1) the financial situation of the licensee and the continued non-compliance of the licensee with the Companies Act;
- (2) the reasoning for the agreement entered into between HFM and YB20;

- (3) that the contract with YB20 did not negate the application to transfer the licence; and
- (4) that the decision to refer the alleged transgressions of the DCC to the CCC is incumbent on ICASA and on the DCC.

[54] On 16 July 2019 a letter titled RE: CONTRAVENTION OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 AS AMENDED AND THE COMMUNITY BROADCASTING SERVICES REGULATIONS 2019 was received from ICASA. The gist of the letter was:

- (a) that ICASA could not understand why DCC chose to comply with the Companies Act and not the ECA;
- (b) the fact that ICAASA did not recognise YB20; and
- (c) request for a date of commencement of broadcasting services by DCC and who did the DCC contract to initiate the process to transfer or surrender the licence.

The information requested by ICASA had been divulged in other correspondence or meetings and I considered the request by ICASA for a repeat to be superfluous.

[55]All the correspondence received from ICASA was given the Ref: 16/1/1/1/10 so it was extremely difficult to refer to individual letters.

[56]Between 23 May and 22 July 2019, close to two month, correspondence was exchanged with ICASA in an attempt to arrange a face-to-face meeting to attempt to resolve what was becoming a fully-fledged impasse. I am not sure that this is acceptable behaviour of a Regulator.

[57]Finally a meeting was scheduled for 24 July 2019 at the ICASA offices. I personal found this meeting intimidating and overwhelming. The meeting was held with members of the CCA. I was confronted with the regulations and informed of the sanctions that could be forthcoming if the licensee did not comply. The occurrence of this meeting was confirmed by ICASA in correspondence dated 29 July 2019.

[58]The most disconcerting comment made by ICASA in the meeting of 24 July 2019 was that it was required that broadcasting take place from the premises originally used by HFM. As has been noted previously, the original studios and associated equipment had already been dismantled so it would have been very disruptive, expensive and time consuming to have instituted the broadcasting activity from the original premises.

[59]The results of this meeting held on 24 July 2019 reinforced the impression with me that ICASA was operating according to some agenda that was unknown to DCC.

[60]On 29 July 2019 I receive a letter entitled RE: CONTRAVENTION OF LEGISLATION AND REGULATIONS where the letter confirmed the occurrence of the meeting of 24 July 2019. The gist of the letter was:

- (1) that the Authority did not recognise YB20 as an entity that was granted and issued with a licence in terms of the ECA;
- (2) the DCC (as licensee) did not comply with regulation 12 of the Regulations 2019 by concluding and agreement with YB20;
- (3) that the equipment donated by the MDDA cannot be disposed of without consulting the MDDA; and
- (4) That the intention to transfer must be tabled at a meeting of the community

implying that DCC was required to convene a Special General Meeting.

It was finally noted that if the DCC did not comply the Authority will refer the matter to the CCC.

[61] On 8 August 2019 I provided a reply addressing the following issues:

- (1) Indication was given that broadcasting had ceased but with the position of Mr Motseki Mabuya acting as station manager and the continued insistence of ICASA that broadcasting be resumed, contact was made with representatives of the Col of the DCC and broadcasting to the Col was resumed under the direction of the licensee;
- (2) The fact that the DCC originally resolved to surrender the licence and that transfer was the suggestion of ICASA was reinforced;
- (3) The re-establishment of broadcasting facilities on the premises of DCC (the Licensee) was impractical and would not be undertaken;
- (4) That DCC had addressed communication to the MDDA but had not received a reply (to date no reply has been received); and
- (5) The possibility of convening a Special General Meeting of the DCC had been discussed with the directorate of the licensee and the request had been acceded to. Further correspondence in this regard would only be forthcoming depending on the final directive of ICASA.

It was also noted that non-compliance would, in my interpretation, result in the referral of this matter to the CCC. It was requested that in this case, ICASA follow a transparent process in respect of such a referral.

[62] The overriding impression obtained in this entire process is that ICASA was for some unknown reason, shying away from referring this issue to the CCC for fear of not achieving their desired result. They were relying on their draconian attitude to cause the DCC to submit and abandon the process of surrendering (or transferring) the licence. I wish to emphasise that ICASA may not force DCC to operate the company HFM at a financial loss and as such a resolution to this issues must be forthcoming.

[63] The attitude of ICASA in compliance with the preliminary ruling of the CCC, where a response to the complaint has not been submitted to the complainant in the time frame specified, is indicative of the total disdain for the legislated process and utter arrogance on the part of ICASA. This is further an indication of the reluctance of ICASA to refer this issue to the CCC.

[64] In the REASONS DOCUMENT published with the 2019 Regulations in Gazette 42323 it is noted in paragraph 13.6 that *"The Authority does intervene with cases of non-compliance to assist the broadcasters to comply, before penalties are imposed through the CCC process."* The assistance in and urgency of finding an amicable solution to this issue has not been forthcoming from ICASA and the actions of ICASA have been very obstructive in considering the position of the licensee DCC. If there was merit in the entire process, ICASA would have followed a very logical process ending with adjudication by the CCC.

[65] In addition, the DCC (the licensee) has requested a resolution to this process on a number of occasions but this has not been forthcoming. The attitude of ICASA experienced by the DCC falls way short of commitment expressed by ICASA in the REASONS DOCUMENTS referred to above.

[66] In terms of all the correspondence in this regard, I find it anomalous that ICASA were

reluctant to refer the issue to the CCC and it was only on the behest of HFM that the CCC has initiated any action. This places the motives of ICASA in a very subjective regime.

[67]There seems to be a certain amount of confusion with respect to YB20 and YB20 Leadership. This should be easy to clarify.

[68]Notwithstanding the information I have elucidated above, I have experienced the interaction with ICASA as being one of inaction, draconian and bullying tactics and generally being one of frustration and dissatisfaction. This problem could have been resolved at least five months ago if ICASA acted as a regulation should and not been so intransigent and unapproachable.

LETTER FROM THE AUTHORITY TO DELTA CHRISTIAN CENTRE

RE: CONTRAVENTION OF THE ELECTRONIC COMMUNICATIONS ACT OF 2005 AS AMENDED AND THE COMMUNITY BROADCASTING SERVICES REGULATIONS 2019

[7]Your letter dated 25 June 2019 refers.

- 1) The Authority forwarded a letter dated 19 June 2019 to Delta Christian Centre the "Licensee" to resume and restore broadcasting services immediately. The same letter further required the licensee to submit some or other proof of resumption of broadcasting services. To date the Authority has not received any proof thereof.
- 2) Section 7 of the Electronic Communications Act 2005, as amended ("ECA") states the following:
"Except for services exempt in terms of Section 6, no person may provide any service without a licence."
- 3) Kindly note that the intended new licensee, namely YB20, cannot hold any sound broadcasting licence by virtue of a simple handover of transfer to them of the licence that was awarded and issued to Delta Christian Centre. The Authority does not recognise them.
- 4) Therefore, YB20 cannot provide broadcasting services as per the ECA because no third party or any other entity may provide broadcasting services, other than the entity to whom the Authority granted and issued the licence to.
- 5) Regulation 8 of the Community Broadcasting Services Regulations, 2019, ("the Regulations") published in Government Gazette Nr 42323 and dated 22 March 2019, provides as follows:

"8 Licence Transfer

- (1) An intention to transfer of a licence from one entity to the other must be tabled and endorsed by the licensee's constituency either at its annual general meeting or special general meeting.*
- (2) Full disclosure of the intended transfer must be tabled and submitted to the community served.*
- (3) Subject to sub-regulation 2 above, the licensee must submit the intended transfer to the Authority for consideration.*
- (4) The licence transfer application must be lodged in terms of the Processes and Procedures Regulations.*
- (5) The criteria of whether to transfer or not to transfer a community broadcasting service licence, is the same as contained in regulation 4 of these regulations.*
- (6) Where necessary, the Authority will publish a notice to conduct public hearings for community broadcasting licence transfer."*

6) In the event that Delta Christian Centre may claim to have entered into a management agreement with YB20, the Regulations are also very clear in that regard and they provide as follows:

"12 Management Contract

- (1) Management contract must be lodged with the Authority for approval."*

7) Further, the Regulations provide as follows:

"13 Community participation

A licensee must ensure that ownership of the community broadcasting licensee remains with the community served."

8) The clauses quoted above are clear and self-explanatory and the Authority or the Compliance and Consumer Affairs (CCA) division does not have any record of compliance by Delta Christian Centre with the community broadcasting Services Regulations, 2019 referred to above.

9) Therefore, the Authority is of the view that Delta Christian Centre has contravened the Community Broadcasting Services Regulations 2019, by transferring control of its licensed services to YB20 without the Authority's approval. Therefore, the contraventions should be referred to the Complaints and Compliance Committee (CCC) for adjudication.

10) Section 3 of the Promotion of Administrative Justice Act, 2000 (Act no 3 of 2000), deals with procedurally fair administrative action, including the right to afford a person affected by an administrative action a reasonable opportunity to make representations. Therefore Delta Christian Centre is hereby required to provide the Authority with reasons within 7 (seven working days of receipt of this correspondence, as to why it should not be taken to the CCC for the said contraventions.

11) Delta Christian Centre should submit to the Authority the representations referred to in paragraph 10 above, on or before 18 July 2019 for the attention of the Manager: Broadcasting Compliance, Ms Busisiwe Mashigo by email.

Should Delta Christian Centre require further clarification or enquiries, the licensee may direct all that to Ms Mashigo by email above or by telephone...

Further Letter from ICASA to Delta CC

Re: CONTRAVENTION OF LEGISLATION AND REGULATIONS

The subject above refers.

- 1) The compliance and Consumer Affairs ("CCA") confirms a meeting it held with and at the request of Delta Christian Centre known as Hweletsa Hope FM ("Licensee"), on 24 July 2019 at the premises of the Independent Communications Authority of South Africa ("Authority").
- 2) The licensee was represented by Mr Anthony Hearn, the CCA was represented by Ms Busisiwe Mashigo, Ms Xolani Makhoba, Ms Teboho Malefane and Mr Maano Dzebu.
- 3) Hereunder is the record of the agreement reached in the meeting:
 - 3.1 CCA advised the licensee that the Authority does not recognise YB20 as an entity that was granted and issued with a licence in terms of the Electronic Communications Act, 2005 (Act no. 26 of 2005) ("ECA"). Further, the Licensee did not comply with Regulation 12 of the Community Broadcasting Regulations 2019, in concluding the purported agreement with YB20.
 - 3.2 Therefore, YB20 must cease broadcasting activities on behalf of Delta Christian Centre immediately. The licensee must also confirm in

writing the cessation of broadcasting activities by YB20.

- 3.3 The CCA reiterated its position as stated in the letter dated 18 June 2019 whereby the Authority directs the Licensee to resume and restore broadcasting services immediately. The CCA is awaiting proof that the licensee has resumed its broadcasting activities as per the licence terms and conditions. We hereby request that confirmation in the form of a signed board resolution, proof that the licensee has resumed broadcasting activities. In addition, we request programme recordings from the first week of Hweletsa Hope resuming its broadcasting activities.
- 3.4 It was further explained to the licensee that the broadcasting equipment donated by the MDDA to Delta Christian Centre cannot be disposed of without consultation with the MDDA. The licensee therefore must retrieve the broadcasting equipment from YB20 immediately.
- 4) Further to the above, Regulation 8 of the Community Broadcasting Service Regulations, 2019 as published in Government Gazette nr 42323 dated 22 March 2019 (CBS Regulations), provides as follows:
- “(1) An intention to transfer of a licence from one entity to the other must be tabled and endorsed by the licensee’s constituency either at its annual general meeting or special general meeting.*
- (1) Full disclosure of the intended transfer must be tabled and submitted to the community served.”*
- 5) The Licensee must provide the Authority with proof of complying with paragraphs 3.2, 3.3 and 3.4 above on 8 August 2019 for the attention of Ms Busisiwe Mashigo, Manager, Broadcasting Compliance via her email address:...
- 6) In the event that Delta Christian Centre fails to abide by all the above, the Authority will refer the matter to the Complaints and Compliance Committee (“CCC”) for a hearing and adjudication.

FINDING BY THE CCC

[8] In the light of the conclusion reached by the CCC, it is not necessary to quote further correspondence. It should be mentioned that the above quoted letter from Ms Mashigo places the matter beyond doubt as to the facts and the Law.

It is also important to mention the enormous task which the ICASA Licensing and Consumer & Complaints Affairs Divisions have. There are more than 300 community broadcasters which must be monitored by the said Divisions – plus, of course, commercial broadcasters. Community Broadcasters (as is also the case with other broadcasters) have a duty to abide by the Law of the Country, which includes Regulations, and when a community broadcaster believes that it may simply transfer its licence to another entity, it has already demonstrated that it has not taken the trouble to read the Regulations or inquire from ICASA. The criticism expressed on behalf of the Complainant in paragraphs [64] - [67] is, accordingly, with respect, unfair. The broadcaster was at fault and ICASA was merely attempting to address the problem with an open mind. Once again: it is not only the broadcaster which is in trouble, but the community which it served which is prejudiced. ICASA provided the radio station with the privilege of broadcasting to a specific community and it is that community which, above all, suffers from the dereliction by the radio station to provide it with the information which all South Africans need and is guaranteed by section 16 of the Constitution of the RSA.

[9] The process for transferring a licence to another entity is outlined as follows in Regulation 8 of the Community Broadcasting Service Regulations, 2019 as published in *Government Gazette* No. 42323 dated, 22 March 2019 (CBS Regulations) and provides as follows:

8. Licence transfer

- (1) *An intention to transfer of a licence from one entity to the other must be tabled and endorsed by the licensee's constituency either at its annual general meeting or special general meeting.*
- (2) *Full disclosure of the intended transfer must be tabled and submitted to the community served.*
- (3) *Subject to sub-regulation 2 above, the licensee must submit the intended transfer to the Authority for consideration.*
- (4) *The licence transfer application must be lodged in terms of the Processes and Procedures Regulations.*
- (5) *The criteria of whether to transfer or not to transfer a community broadcasting service licence, is the same as contained in regulation 4 (4) of these regulations.*
- (6) *Where necessary, the Authority will publish a notice to conduct public hearings for community broadcasting licence transfer.*

The Licensee is required to submit the application to transfer via a Form H (found in the Processes and Procedures Regulations attached herein), following the requirements stipulated in Regulation 8 above.

[10] Then there is Form L, which ICASA has repeatedly requested the broadcaster to file. It deals with the amendment of details concerning the licensee and is essential in this process.

[11] Mr Hearn has indicated, in the hearing, that he would need a month to conclude the matter from his side. As indicated above, the Authority would have to approve the transfer – which, of course, can only be for the balance of the licensees’ term. As indicated above, a special form would have to be provided with details as required.

ADVICE TO COUNCIL

[12] The CCC has decided to advise that Council grant Mr Hearn, who is- in effect- representing the broadcaster, 90 calendar days to conclude the matter from his side. This is a realistic time span – which, it is hoped, will be shorter.

That would mean that :

- (a) Form L must reach ICASA within forty (40) calendar days.
- (b) Form H must reach ICASA fifty (50) calendar days thereafter. The days would count as from the first calendar day after the decision of ICASA is issued.
- (c) The above letter from Ms Mashigo sets out the legal position clearly.
- (d) Until the application is approved by ICASA, Hope FM is permitted to continue with the broadcast in the interest of the Community, as requested by Station Manager Mabuya, who also gave evidence at the hearing. We understand that the station is, in any case, broadcasting. Given the Community’s Constitutional right to be informed, that is indeed a plus.



JCW van Rooyen SC

The Members agreed with the Judgment

20 November 2019