



## **COMPLAINTS AND COMPLIANCE COMMITTEE**

**DATE OF HEARING: 19 SEPTEMBER 2022**

**CASE NO: 446/2022**

**ICASA: EASTERN CAPE  
REGIONAL OFFICE COMPLAINANT**

**COMPLAINANT**

**V**

**OASIS RADIO**

**RESPONDENT**

### **CCC MEMBERS:**

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

### **FROM THE OFFICE OF THE CCC:**

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

### **LEGAL REPRESENTATION FOR PARTIES**

The parties were not legally represented

Mr Ncukana, Mr Holster and Mr Gerber  
made submissions on behalf of the Complainant

Mr Andre Swartz made submissions on behalf of the Respondent

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## JUDGMENT

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Judge Thokozile Masipa

### INTRODUCTION

- [1] The Complainant is the Eastern Regional Offices of ICASA operating in the Eastern Cape.
- [2] The Respondent is the Oasis FM, a community sound broadcasting service licensee, based in the town of Jeffrey's Bay within the Kouga Local Municipality of the Eastern Cape Province.
- [3] On 17 November 2010, ICASA granted and issued a Class Electronic Communications Network Service Licence No: 0158/CECNS/NOV/2010 to COMMUNITY RADIO KAROO with registration No: 2011/119776/08. Community Radio Karoo was later changed to Oasis FM.

### THE CHARGE SHEET

- [4] The Respondent was called upon to answer the following charges:

#### *Charge 1*

*1.1 Failure to comply with regulation 38(1) of the Radio Frequency Spectrum Regulations, 2015 - Oasis Radio installed and operated its radio broadcasting transmitter (89.8 MHz) at a different location to what is stated in its Radio Frequency licence terms and conditions.*

#### *Charge 2*

*2.1 Failure to comply with a written notice issued under section 4(3)(g) of the ICASA Act No. 13 of 2000.*

## **FACTUAL BACKGROUND**

[5] The facts in this matter are common cause.

[6] In terms of the licence above, the principal physical address of the Respondent is 149 Da Gama Road, Jeffreys' Bay, Eastern Cape.

[7] Clause 2 of the Schedule deals with Geographic coverage and states:

*"The Licensee shall provide its electronic communications network service within the boundaries of Cacadu District Municipality in the Eastern Cape".*

[8] In June 2016 a Radio Frequency Spectrum Licence No:

Class/Re/Com/RF289/June/2016 was granted and issued to Community Radio Karoo NPC for the provision of Community Sound Broadcasting Service to be known as Radio Karoo.

[9] Clause 3 of the Schedule sets out the Geographic Coverage Area as follows:

*"The Licensee shall provide services in Cacadu District Municipality in the Eastern Cape Province. The licensee must comply with the attached technical specification (schedule B2)."*

[10] Schedule B2 includes details of transmitters as can be seen from page 33 to page 38 of the papers. It is not necessary to discuss the details of the names attached to individual transmitters. Suffice it to say that nowhere in Schedule B2 does the name Kwagga Street, Jeffrey's Bay appear.

[11] Instead, on page 38 of the papers, Coverage Area Schedule B2 sets out the Transmitter Data as follows:

*Name: KAREEDOUW*

*Coordinates: 24E25 43/34S01 32*

*Frequency: 89 800 MHz*

*Power (ERP): 6 kW*

*Height (AMSL): 726*

*Antenna Height: 50*

*Polarisation: vertical*

[12] For reasons which are not clear, it appears that the Respondent ignored Schedule B2 insofar as the Kareedouw site was concerned. In clear violation of Schedule B2, the Respondent proceeded to install its transmitter at an unauthorised site in Kwagga Street, Jeffrey's Bay instead of the approved site in Kareedouw Mountain.

[13] The result is that the Respondent's actual current transmission site is at Kwagga Street in Jeffreysbay, 44 km from the authorised licence site. This is what led to the present complaint.

### **CIRCUMSTANCES THAT TRIGGERED THE PRESENT COMPLAINT**

[14] On 22 September 2020, the Eastern Cape Regional Office received a complaint from a member of the public residing in Jeffrey's Bay. The complaint was to the effect that the man was unable to listen to Luister FM , a Community radio station broadcasting from Port Elizabeth, within the Nelson Mandela district municipality.

[15] Following investigations of the above complaint, the investigator found that Oasis Radio had installed its radio broadcasting transmitter 89.8 MHz at address 64 Kwagga Street, Jeffrey's Bay and not at the Kareedouw mountain in terms of its licence. This had been done without the required approval of the Authority.

[16] Subsequently, the station manager, Mr Andre Swartz, was served with a written notice of contravention dated 3 November 2020. In the notice, ICASA advised the Respondent to move its transmitter to licensed site or apply for current address as transmitter installation address or make equipment available for sealing within 30 days of the notice.

[17] Following the notice, the Respondent heeded none of the advice above. In fact all the options by ICASA were ignored. Instead, Mr Swartz asked for more time to remedy the situation. On 30 November 2020, Mr Swartz addressed an email to ICASA. Among other things, he stated:

*"At our office Mr Gerber said though it is not a case of interference he will still issue a notice of contravention because our antenna is not located on the*

*Kareedouw mountain according to our Spectrum Licence Specifications. I further indicated that we are in the process to relocate the transmitter to achieve maximum radio coverage. Telkom already approved our collocation application and therefore we are in the final stage before installation commenced. An equipment grant was also approved but not yet paid out, this will supplement the relocation equipment costs needed. Telkom quoted us over R12,000/mth for a link to the site, therefore we declined and applied for a grant to purchase our own STL link equipment. Once this is in place then we will eagerly relocate our transmitter for improved coverage.”*

[18] The email concludes:

*“We need more time to conclude the purchase and installation of FM equipment on the Kareedouw Telkom MW site whereafter we will relocate as said herein”.*

[19] It is important to note that two years later, Oasis still operates and continues to broadcast from its offending transmitter in Kwagga Street, Jeffrey’s Bay.

## **OASIS DEFENCE**

[20] Mr Swartz, the station manager for Oasis, made submissions in defence of the Respondent.

[21] From the submissions it appears that Mr Swartz missed the point why the ICASA Eastern Cape Regional Office referred the complaint against Oasis to the CCC. This can easily be deduced from his responses to the Complainant and from the submissions he made to the CCC.

[22] In his response to the charges against the Respondent, Mr Swartz did not deny any of the allegations against the Respondent but seemed to place emphasis on what he considered the “trifling nature” of the incident that led to the complaint by the ICASA Eastern Cape Regional Office. He pleaded that the notice of contravention be set aside on the basis that the complaint of “interference” had no merit.

[23] Similarly, a sizeable portion of Mr Swartz's submissions dealt with allegations of interference against the Respondent. This over emphasis overlooked the fact that CCC's focus was solely on the charges before it, that is, whether:

(1) Oasis FM contravened Regulation 38(1) of the Radio Frequency Spectrum Regulations of 2015, as amended and whether

(2) Oasis FM contravened Section 4(3)(g) of the ICASA Act of 2000, as amended.

[24] Once the two charges have been proved, a finding of contravention as charged would be inevitable and the next step for the CCC would be to decide on the appropriate sanction.

[25] In the present case, the Respondent did not deny that it had installed its transmitter at Kwagga Street, Jeffrey's Bay instead of the authorised site at Kareedouw mountain. It raised a defence that it lacked the necessary financial resources to buy powerful equipment that would enable it to operate from Kareedouw mountain.

[26] According to the Respondent it had applied to MDDA for funding and would start broadcasting from Kareedouw mountain once funding has been approved.

[27] This defence has no merit. Pleading indigence as reason for failure to comply with the law can never be acceptable as a defence.

[28] In addition, for its defence, the Respondent relied on an undertaking that as soon as funds became available it would comply.

[29] There are several difficulties with this undertaking. The first is that it is open ended. No one knows if and when funding would become available. Secondly, the undertaking is not new. Mr Swartz made the same undertaking two years ago, but since then there has been no progress.

## **FINDING**

[30] On the facts of this matter, the finding of the CCC is that:

30.1 the Respondent has contravened regulation 38(1) of the Radio Frequency Spectrum Regulations of 2015 as amended, in that it installed its transmitter at and is operating from a site in Kwagga Street, Jeffrey's Bay instead of the licensed site in Kareedouw mountain.

30.2 The Respondent has contravened Section 4(3)(g) of the ICASA Act of 2000 as amended in that it failed to comply with a notice of contravention from ICASA.

[29] It now remains for the CCC to consider the appropriate sanction.

### **AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS**

[30] In considering an appropriate sanction in this matter the CCC had to take into consideration both the mitigation factors as well as aggravating factors.

[31] There are indeed several aggravating factors in this matter. The first is that the nature of the two instances of non compliance is very serious. Most disturbing is that following non compliance, the Respondent failed to show any remorse. This is hardly surprising considering that it appears that the Respondent lacks insight into the serious nature of the allegations against it. Without such insight the Respondent might well repeat the contravention and find itself in a similar position in the future.

[32] The extract hereunder sums up the attitude of the Respondent. In its response to the contravention notice, in a letter to ICASA, on behalf of the Respondent, Mr Swartz wrote as follows:

- *"...Mr Gerber threatened Oasis FM with sealing off our transmitter in 30 days if we don't comply and rectify his findings details in his notice. Unknowing (sic) to him Oasis FM have been broadcasting the past two years from our roof like many other Community Broadcasters that don't have the immediate means to broadcast from high transmitter co-location and link costs."*

[33] This is a startling admission on the part of the Respondent, as it smacks of a culture of entitlement. Lack of resources can never be an excuse for a Licensee to contravene the law.

[34] More worrisome, however, is the allegation that the contravention has been going on for two years, undetected. This is clearly not only an aggravating factor, but also a sad indication that the regulatory system may not be as efficient as it should be. (We shall come back later to this point when we deal with recommendations).

[35] One mitigating factor that counts in the Respondent's favour is that Respondent is a first offender. On the other hand, aggravating factors, such as the on-going relentless non compliance, far outweigh the fact that the Respondent has a clean record. An appropriate sanction, therefore, is the one that would reflect a balance between the aggravating factors and the mitigating factors.

[36] Regulation 41(6) specifically provides for a fine of not less than R250000 for this kind of non compliance. This means that the CCC is obliged to recommend the imposition of the stated amount.

[37] The hands of the CCC are tied insofar as the sanction is concerned. That, however, does not prevent the CCC from adopting a compassionate approach that is less likely to lead to the Licensee's demise. This is important since the Licensee specifically pleaded that it was indigent.

[38] Equally important is the message that the CCC wants to send out to the public. All are equal before the law. The imposition of a sanction, therefore, must not be seen to be dictated to by whether the Licensee is wealthy or poor.

## **ORDER**

[39] Accordingly, the CCC recommends that an order be issued by the Authority, namely—

- (a) direct the Licensee to desist from further contravention;



- (b) direct the Licensee to pay a fine in the amount of R250000, in respect of the non compliance above;
- (i) half of the amount above is to be suspended for three (3) years on condition that the Licensee does not violate any regulations or sections referred to in the charge sheet, during the period of suspension.
- (ii) the remaining R125000 shall be payable over a period of twelve (12) months.
- (c) direct the Licensee to take steps to move its transmitter to licensed site within 30 days from the issue of this order or to apply for current address as transmitter installation address within 14 days of the issue of this order.

#### **RECOMMENDATIONS IN TERMS OF 17B**

[40] In terms of 17B(b) of the ICASA Act, the CCC *may make recommendations 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.*

[41] During the course of the hearing of this matter, it came to the attention of the CCC that the contravention that the Respondent was charged with had in fact been going on for two years and that there were other Licensees who possibly might be guilty of a similar contravention.

[42] The CCC was unable to verify the truthfulness of these startling allegations, since they did not feature in the charge sheet. However, such allegations could not simply be ignored because of the seriousness of their impact on the industry should they be found to be true.

[43] If, indeed, the Respondent had been contravening its spectrum licence for two years, without being detected and without being called to account, then the Authority is dealing with a serious problem.

[44] One of the functions of the Regulator is to monitor the activities of licensees so as to ensure compliance with the relevant laws and regulations. A regulator that appears to have no teeth is cause for concern as this has a potential to encourage licensees to disregard the laws with impunity.

[45] For that reason the CCC makes the following recommendations to the Authority: that

45.1 an investigation be conducted into the allegations concerned to verify them and, if true, to find the source of the shortcomings in the regulatory system and,

45.2 depending on the outcome of the investigation, that the regulatory system be reviewed.

*TMMasipa*\_\_\_\_\_

**Date: 18/04/2023**

**Judge Thokozile Masipa**  
**CCC Chairperson**