

COMPLAINTS AND COMPLIANCE COMMITTEEⁱ

Case number: 55/2011

In the matter between:

THE LICENSING AND COMPLIANCE DIVISION OF ICASA

Complainant

and

ALGOA FM

Respondent

COMPLAINTS AND COMPLIANCE COMMITTEE

Judge IWB de Villiers	(Chairperson)
Councillor N Batyi	(CCC Member)
Ms N Ntanjana	(CCC Member)
Mr Z Ntukwana	(CCC Member)
Mr J Tlokana	(CCC Member)
Ms T Ramuedzisi	(CCC Member)

JUDGMENT

IWB de Villiers

- 1) Algoa FM a licensed radio broadcaster in Port Elizabeth, has been charged with contravening s58(6) of the Electronic Communications Act, No 36 of 2005, ("ECA") read with regulation 6(1) of the Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters during Municipal Elections (R203,

ⁱ In terms of s17C of the ICASA Act 13 of 2000, as amended

Government Gazette, 8 March 2011) (“the regulations”) which states that a political advertisement may only be broadcast during election period and no later than forty-eight (48) hours before polling commences.

- 2) The matter was first placed before the Complaints and Compliance Committee (“the CCC”) by Ms L Mabulu, the Co-ordinator of the Committee, on or about 6 June 2011. She informed us that the CCC had received a complaint from the Committee responsible for monitoring elections that Algoa FM (“the Respondent”) had contravened the provisions referred to in the charge, and enquired whether the CCC could finalise the matter without compelling the Respondent to come to Johannesburg to attend a hearing of the matter. However, the CCC had two problems with this request. Firstly, whether the Authority should not have referred the matter to the CCC in terms of s17B(a)(i) of the ICASA Act, no 13 of 2000 (“the Act”). Secondly whether the licensee should not be granted an opportunity of attending a hearing before the CCC.
- 3) It may be that the first problem is not really a problem since s17B(a)(ii) and (iii) of the Act provide that the CCC must also investigate, and hear if appropriate, and make a finding on complaints and allegations of non-compliance with the Act or the underlying statutes received by it. However, in as far as it may be a problem it has been removed by the fact that the Authority has now referred the matter to the CCC.
- 4) The CCC raised the second problem because the Respondent, in its letter dated 20 May 2011, in which it acknowledged receipt of the charge sheet and expressed its sincere apologies for the broadcast made in error during the first 24 hours of the 48-hour period prior to the commencement of the relevant polling period, requested that the Respondent’s history be taken into account in considering whether or not to

impose any penalty and that it would appreciate a further opportunity to address the CCC on this in the light of regulation 6(7).

- 5) Regulation 6(7) provides that a party that submits a political advertisement for broadcast to a broadcasting service licensee, is deemed to have indemnified the broadcasting service licensee against incurred costs, damages, losses and third party claims arising from the broadcast or non-broadcast thereof.
- 6) It is not clear whether regulation 6(7) is at all relevant in the present context. Regulation 6(7) seems to make no provision that if a fine is imposed on the broadcasting service for contravening the provision of the regulation 6(1), the party submitting the political advertisement must indemnify the broadcasting service against such fine. However, it is unnecessary to decide the point.
- 7) In view of the Respondent's request for a further opportunity to address the CCC, the CCC was of the view that it was not entitled to deal with the matter unless the Respondent had been afforded an opportunity of appearing before the CCC to advance whatever arguments it wished to raise in respect of the charge against it. The CCC's views in this regard were conveyed to Ms Mabulu and she was requested to inform the Respondent thereof.
- 8) On 12 July 2011 Ms Mabulu addressed an email to me in which she stated that she had spoken to Mr Dave Tiltmann, the Managing Director of the Respondent, about the fact that it would like to be heard by the CCC in respect of the elections complaint lodged by ICASA against it, and that he had indicated that Respondent is prepared to relinquish its rights as long as the matter is resolved. Ms Mabulu also informed me that ICASA urgently needs the CCC to finalise the complaint if it is possible to do so.

- 9) Ms Mabulu has subsequently informed me that Mr Tiltmann, on behalf of the Respondent, during their said conversation stated that Respondent is relinquishing its rights to appear before the CCC to address it concerning the matter, and that he wishes the CCC to deal with the matter in Respondent's absence, but that he wishes to address the CCC in writing as to the penalty the CCC may impose. Ms Mabulu accordingly addressed an email to Mr Tiltmann in which he was invited to send by email the Respondent's arguments in regard to an appropriate sentence.

Mr Tiltmann has reacted thereto in an email to Ms Mabulu dated 3 August 2011. I have taken into account the contents of this email, as well as all the other facts that have been brought to our attention before. In his latest letter Mr Tiltmann refers to repercussions within their company and among their advertisers and supporters which has been a serious warning for them as well. He asks the CCC to consider that the Respondent has served its sentence. If the CCC considers that a further sanction is required, he suggests a written warning.

- 10) In the circumstances, I am of the view that the CCC is entitled to deal with the matter on the basis of the information which the Respondent has provided.
- 11) In his letter to ICASA dated 20 May 2011 Mr Tiltmann already apologised unreservedly for the oversight in making the broadcast. He stated that the Respondent had not during its long history, received a breach notice from ICASA or the CCC and indeed, to his knowledge, the Respondent had not received such a notice during his 22 years at the station. In paragraph 3 of the letter he stated that the Respondent does not favour any political party and it was not its intention to convey

that impression, or to unduly benefit any party whatsoever. He believed this to have been a very genuine and regrettable mistake, which would not be repeated.

In paragraph 4 he said that the Respondent is preparing a formal apology which would be broadcast without mention of the specific party during prime time programming. Respondent would also address a written apology to the other political parties whose advertisements it had been broadcasting and would apologise in writing to the IEC. The breach appeared to have been a cause of concern to only one individual, to whom the Respondent would also apologise. He requested ICASA to take account of Respondent's history in considering whether or not to impose any penalty. It appears from Mr Tiltmann's latest email that Respondent has apologised to the other political parties in the area which might have been concerned that Respondent had flighted an advertisement contrary to the regulations.

- 12) The Respondent has furnished ICASA with a copy of its letter of apology, dated 25 May 2011, to Mr Gledwyn Lindemann, the complainant. It is obviously an appropriate apology. It is not clear whether an apology to the listeners has already been broadcast. If not, such an apology should be broadcast within fourteen days after the council has accepted the CCC's recommendation.

- 13) S3(3) of the Promotion of Administrative Justice Act, no 3 of 2000, (PAJA) provides that in order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person whose rights or legitimate expectations are affected by administrative action, an opportunity to present and dispute information and arguments and appear in person.

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- 14) As indicated, the Respondent's managing director has indicated to Ms Mabulu that Respondent relinquishes its rights to appear before the CCC, wishes the CCC to deal with the matter in its absence and to consider that Respondent has in the circumstances served its sentence, alternatively to impose a written warning.
 - 15) The Respondent's representations concerning the charge against it have already been fully set out in writing by its managing director. Furthermore Ms Mabulu has informed me that ICASA urgently needs to finalise an Elections Report and for that reason requests the CCC to finalise this complaint.
 - 16) The Respondent would, in my view, not be prejudiced in any way if the CCC were to find the Respondent guilty on the charge and to recommend a suitable penalty to the Authority without affording the Respondent an opportunity to present oral arguments at the hearing before the CCC. Nor would the administrative action of the CCC be procedurally unfair in the circumstances. Accordingly, I am of the view that the CCC may exercise its discretion in terms of s3(3) of PAJA, proceed to find the Respondent guilty on the charge and to recommend a suitable penalty to the Authority.
 - 17) Regulation 9 of the relevant regulations provides that failure by a broadcasting service licensee to comply with the regulations will result in a fine not exceeding one million rands. In the context, the word "will" obviously mean "may".
 - 18) In the case of the Democratic Alliance versus Eden FM (case no 21 of 2008) a broadcaster flighted a political advertisement later than 48 hours prior to the commencement of the polling period in contravention of s58(6) of the ECA. The broadcast took place as a result of the negligence of the broadcaster. In paragraph 4 of the judgment the following was stated: "In spite of the mitigating factors

mentioned, it is necessary that the CCC and Council express its displeasure at the conduct of the respondent and impose a sanction which would act as a warning against similar future conduct by the respondent". The following sanction was recommended to Council: "that the licensee is ordered to pay a sum of R5 000,00. This fine is suspended until expiry of the present licence. If the licensee is found by the CCC to have contravened the said period, the fine becomes operative".

- 19) No other cases where the sanctions for contravening of s58(6) of the ECA or regulation 6(1) of the regulations have been applied, have been brought to my notice.
- 20) I do not consider that Respondent has served its sentence, as is suggested by Mr Tiltmann. I also do not regard a written warning as an appropriate sentence. The size of the fine that may be imposed indicates that contraventions of the regulations are seen in a serious light.
- 21) I consider that a fine of R10 000,00 would be appropriate in the circumstances of this case, but it would not be appropriate to suspend the sentence as in the Eden FM case".
- 22) The CCC finds that the Respondent has contravened s58(6) of the ECA, read with regulation 6(1) of the regulations.
- 23) The CCC recommends that Council should impose the following sanction:
 - (1) The licensee is ordered to pay a fine of R10 000,00; thirty days(30) days after confirmation of this recommendation by the Council of ICASA.

(1) If the respondent fails to pay within the stipulated period; the amount of the fine should bear interest at the rate of 15;5% per annum

(3) If an apology to listeners has not yet been broadcast, the Respondent is ordered to do so within fourteen days after the Council has accepted this recommendation.

Dated at Pretoria this 4th day of August 2011.



IWB de Villiers

Acting Chairperson of the CCC

Councillor N Batyi, Ms N Ntanjana, Mr Z Ntukwana, Mr J Tlokana and Ms T Ramuedzisi concurred in the above judgment.