

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 9 June 2011

Case No: 47/2011

In the matter between:

THE COMPLIANCE UNIT OF ICASA	Complainant
and	
DURBAN YOUTH RADIO	Respondent
and	
MFUNDO MOLLOH SIMELANE	Intervening

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)

FOR THE COMPLAINANT

Ms Fikile Hlongwane: Manager: Compliance Unit

assisted by:

Mr Kgomotso Mokitle: Compliance Officer

FOR THE RESPONDENT

No appearance

¹ In terms of S/7C of the ICASA Act 13 of 2000 as amended

FOR THE INTERVENING PARTY

Mr Mfundo Molloh Simelane: Member of a Concerned Group, and ex-Board
Chairman of Durban Youth Radio

JUDGMENT

Judge IWB de Villiers:

1. The Respondent is the holder of a class broadcasting service licence and is licensed to operate a community broadcasting radio station called Durban Youth Radio (DYR) in Durban and surrounding areas in the KwaZulu-Natal Province. In the first charge before the Committee and Compliance Unit (MCU) of ICASA avers that the Respondent has contravened clause 3.2.3 of its service licence which provides as follows:

“The Licensee shall hold Annual General Meetings (AGM) for the following purposes:

- 3.2.3.1 To provide feedback on the Licensee’s compliance with licence conditions;
- 3.2.3.2 To provide feedback on the Licensee’s operational and financial performance; and
- 3.2.3.3 To elect members of the controlling structure, eg. Board of Directors, Trustees, etc., subject to the Licensee’s founding documents”.

2. A second charge is that the Respondent has contravened s6(2) of the Standard Terms and Conditions applicable to Community Broadcasting Licensees which states that “where a licensee cannot provide the licensed service due to circumstances beyond its control, for a continuous period of twelve (12) hours or

longer the licensee must notify the Authority in writing of such circumstances within twenty four (24) hours”.

3. The reference to s6(2) is incorrect. Presumably it should refer to s7(2) of the regulations regarding Standard Terms and Conditions for Class Licences, as published in the Government Notice R1122 of 23 November 2007 (Government Gazette No 30512). The repeal of such regulations in terms of Government Notice R525 of 14 June 2010, as published in the Government Gazette No 33296, will, in terms of s12 thereof come into operation by notice in the Government Gazette. We are informed that such notice has not yet appeared.
4. At the hearing the Respondent was in default of appearance. However, an ex-chairman of the Respondent's board, Mr MM Simelane, presently a member of a concerned group, appeared as an intervening party. In short, his evidence is that despite all the problems which the Respondent is experiencing, its broadcasts have in the past benefited the community which it serves, and that the problems can probably be overcome if the Authority were to order it to hold an annual general meeting within a specified time.
5. Since the Respondent is in default of appearance, it is necessary to outline the steps taken to inform the Respondent of the hearing as well as certain other facts. On 7 February 2011 Ms Lindisa Mabulu, the coordinator of the Committee sent an email to Mr Paul Nzimande, the financial director of the Respondent, requesting the Respondent to respond to the abovementioned charges, a copy of which was attached to her email.
6. On the same day Mr Nzimande, replying by email, acknowledged receipt of Ms Mabulu's email and referring to the allegations in the charges, said: "We

acknowledge the allegations as true". He added: "We substantiate, however, by adding that DYR has maintained regular contact with ICASA, highlighting the nature of the problems inherited by the current board, as well as submitting a detailed practical plan to address those problems supported by commitment from key stakeholders including the City of Durban. We further submit that our term is due to expire at the end of March, at which point we are compelled to have an elective meeting in any case. It is the intention of the current board to step down at the end of our term in March. We, therefore, request a condonation of our non-compliance".

7. Ms Mabulu, quite correctly, asked Mr Maano Dzebu of the MCU for his response to Mr Nzimande's email. He responded immediately that "ever since the current board was elected in 2009, they have never held an AGM and the reasons given were not satisfactory. I am also aware that most of the board directors have resigned....". He added that he is in possession of a resignation letter of the Station Manager to state that there is no activity of any sort at the station and that although the community has been sending enquiries and complaints, nothing is being communicated to them. Mr Dzebu added that the station was off the air before the 2010 Soccer World Cup and although it informed the Authority that it would put its house in order after the World Cup and be back on the air, this never happened. The Respondent, he said, was evicted from its premises during about September 2010. In October 2010 the Respondent communicated a proposed plan to get the station back on the air but this has not yet taken place.
8. On 15 April 2011 Ms Mabulu, the coordinator, sent a letter to Mr Nzimande informing him of the date of the hearing. Subsequently Ms Mabulu again sent emails to Mr Nzimande reminding him of the date of the hearing, however, he replied that he would be unable to attend the hearing. Ms Mabulu responded by

informing him that if Mr Nzimande could not come, other persons could possibly be mandated to attend the hearing on Respondent's behalf. She added that if no one appeared on Respondent's behalf, the hearing would nevertheless continue. Her attitude in this regard must be commended. If a Respondent, despite proper and sufficient notice of a hearing of the Committee, fails to attend such hearing, the hearing may, of course, continue in the Respondent's absence.

9. Fortunately, as indicated, Mr Simelane attended the hearing. He provided the Committee with first hand information, which has enabled us to make the necessary findings of fact. It appears from his evidence that the facts, as set out by Mr Dzebu in his email to Ms Mabulu, are quite correct. As indicated, Mr Nzimande has also conceded, on Respondent's behalf, that the averments contained in the charges are true.
10. The Committee accordingly finds that the Respondent has committed the contraventions set out in the two charges.
11. In terms of s17E(2)(a) and (c) of the ICASA Act the Committee may, amongst others, recommend that the Authority issue an order directing the licensee to desist from any further contravention and direct the licensee to take such remedial or other steps (not in conflict with the Act or the underlying statutes) as may be recommended by the Committee. (The word "not" has clearly been omitted from s17E(2)(c))
12. In our view the Respondent should be ordered to desist from any further contravention and to hold an annual general meeting with a specified time.
13. The Committee requested Ms Hlongwane, who appeared on behalf of the Compliance Unit to provide it with a copy of the Respondent's articles of association. She kindly did so. It appears that the Respondent is registered as a

s21 company in terms of the old Companies Act. The provisions of the new Companies Act, 71 of 2008, which came into operation recently, should, of course, also be borne in mind.

14. Article 2.1 provides that the members of the company shall be the persons whose names are subscribed to the memorandum and articles of association and such other persons as may from time to time be invited by the board of directors to become members and have agreed in writing to be bound by the terms of the memorandum and articles of association of the company.
15. Article 2.2 records that the board of directors shall be under no obligation to admit any persons or organisation to membership upon application.
16. Article 2.3 provides that all applications for membership shall be made in such manner and form and on such conditions as may be prescribed by the board of directors from time to time.
17. Article 4 provides that the number of members shall not be limited, but as required by the Act, "shall at no time be less than 7 (seven)".
18. Article 15.1 provides that the number of directors shall not be less than 2 (two).
19. Article 15.2 provides, subject to an exception not presently relevant, that the directors shall be nominated, appointed, substituted and removed, as the case may be, by resolution of the company in general meeting. Article 15.3 provides that where the number of directors falls below the requisite minimum number, the continuing director may act only to increase the number of directors to the required minimum.
20. Article 15.4 provides, subject to the provisions of article 20, that a director, including co-opted directors, shall hold office from the date of his appointment

until the date of the next annual general meeting on which date he shall resign but shall be eligible for re-appointment by resolution of the company in annual general meeting.

21. Article 20.1.5 provides that the office of a director shall be vacated if a director resigns his or her office by notice in writing to the company.

22. It appears that certain directors who were elected at the last annual general meeting in 2009, have resigned. We do not know how many directors remain. Should the number of directors have fallen below the requisite number of 2 (two) as a result of resignation, the continuing director may increase the number of directors to the required minimum (article 15.3). It seems that at least Mr Paul Nzimande is still acting as a director. If the other directors have resigned, he may, in terms of article 15.3 increase the number of directors to the required minimum of two directors by co-opting a director in terms of article 17 who shall, in terms of article 15.4 hold office until the date of the next annual general meeting on which date he shall resign but shall be eligible for re-appointment by resolution of the company in annual general meeting.

23. It is to be noted that the fact that certain directors elected in 2009, are no longer actively taking part in the activities of the Respondent, does not mean that they have ceased to be directors, since article 15.4 provides that they shall hold office until the date of the next annual general meeting.

24. On the evidence before us, there appears to be a reasonable prospect that the Respondent will be able to overcome its difficulties if a new board of directors is elected at the annual general meeting.

25. As indicated, both charges have been proved. In respect of the first charge it is obvious that the Respondent should be ordered to hold an annual general

meeting within a specified time. We recommend that in respect of the second charge, the Authority should merely order the Respondent to desist from any further contraventions of its licence or in terms of the regulations regarding Standard Terms and Conditions for Class Licences, referred to above.

26. We further recommend that the Authority should order the Respondent to hold an annual general meeting within a period of two months after the date of the Authority's order.

27. Article 9.1 of Respondent's articles of association sets out the requirements in regard to notice of a general meeting, while article 9.2 describes what the notice of the meeting must specify.

28. Article 10 deals with proceedings at general meetings.

29. Article 12 deals with votes of members at general meetings.

30. We recommend that the Authority should order the Respondent to comply strictly with all the provisions of its articles of association, and in particular, those relating to notice of an annual general meeting, the proceedings at such meeting, and the votes of members.

31. In conclusion, we wish to note our appreciation for the difficult task which the Compliance Unit and, in particular Ms Fikile Hlongwane, are performing in relation to contraventions such as these. We do, however, miss the assistance of a qualified legal representative who could argue points of law before the Committee on behalf of the Compliance Unit. As appears from this judgment and other judgments of the Committee many reasonably involve questions of law arise before and during hearings of the Committee. Such a person could also assist the Compliance Unit in regard to the preparation of legal aspects of a complaint and in drawing "the notice setting out the nature of the alleged non-

compliance” referred to in s17C(2)(a)(ii) of the Act. (In practice, this is usually referred to as the charge). In terms of this sub-section the CCC must provide the licensee with such a notice. In practice, the coordinator of the CCC, Ms Mabulu, provides such a notice to the licensee on behalf of the CCC but, quite correctly, she does not draw the notice. In this case it was drawn by the Compliance Unit. However, there are quite a number of legalities involved in drawing such a notice, and in deciding what documents are relevant and should accompany the notice. It sometimes happens that advocates or attorneys appear on behalf of the licensee or a complainant at the hearing. It is, therefore, advisable, in our view, that the Compliance Unit should be represented in all cases by a legally qualified person at the hearing, and that person should assist the Compliance Unit in drawing the notice (or “charge”) and in all preparatory work relating to the hearing. Often legal problems arise while the Compliance Unit is monitoring the conduct of a licensee. The assistance of a legally qualified person at that stage would, in our view, be of great assistance not only to the Compliance Unit but also to the Committee, if a hearing should later take place.

32. The Committee accordingly makes the following recommendations to the Authority:

32.1 that in terms of s17E(2)(a) of the ICASA Act, the Respondent be ordered to desist from any further contravention of its license or the terms of the regulations regarding Standard Terms and Conditions for Class Licences;

32.2 that the Respondent be ordered to take the following remedial steps, namely to comply strictly with all the provisions of its articles of association, and in particular those relating to notice of an annual

general meeting, the proceedings at such meeting and votes of members;

32.3 that the Respondent be ordered to hold an annual general meeting within two (2) months of the date of the Authority's order.

Dated at Pretoria this 3rd July 2011.



IWB de Villiers

Acting Chairperson of the CCC

The above judgment was concurred in by the following members of the CCC, namely Councillor N Batyi, Mr Z Ntukwana, Mr J Tlokana and Ms T Ramuedzisi.