



Mr Sandile Ngema:

Station Manager

Ms Gladys Ngema:

Board Member

---

<sup>i</sup> Established in terms of s17C of the ICASA Act, 13 of 2000 as amended

## JUDGMENT

IWB de Villiers, J

1) Imbokodo Community Radio (“Imbokodo”) is a licensed community broadcaster. The Compliance Unit of ICASA has lodged two charges against Imbokodo, dated 15 November 2010.

2) The charges read as follows:

“1. Imbokodo FM failed to comply with sanction 1 in Case 23/2008 as recommended by the CCC and approved by the Authority’s Council. The sanction stated that audited financial statements must be submitted by Imbokodo for the periods 2006-2007 and 2007-2008 before 31 January 2009. Failing to carry out this order, a maximum fine of R10 000 will be imposed by Council on the recommendation of the CCC. Any omission to provide such financial statements in future shall be brought before the CCC for consideration of a relevant sanction.

“2. Imbokodo FM failed to submit proof of payment of the sanction by the Complaints and Compliance Committee, as requested by the Authority. This is a contravention of clause 9(1) of the regulations regarding Standard Terms and Conditions for Class Licences which states that “the Authority may, in the course

---

of carrying out its obligations under the Act, require a Licensee to provide information, so as to enable it to:

- a) Monitor and enforce consumer protection quality of service, competition, compliance with license conditions and other requirements of the Act and related obligations;
  - b) Facilitate the efficient use of scarce resources; and
  - c) Collect and compile information to be used for the purpose of sectoral analysis, planning, reporting and conducting enquiries”.
- 3) In order to understand the above charges one must have regard to the history of the matter.
- 4) Altogether eight charges against the licensee were brought before the CCC by the Compliance Unit on 17 October 2008 in case 23/2008. Imbokodo was found guilty of contravening charges 1, 2, 3, 4 and 7. No contravention was found in the case of charges 6 and 8. The CCC recommended sanctions to the Authority in respect of the charges that had been contravened. The sanction recommended in respect of the first charge is set out in charge 1 of the present charge sheet. Similar sanctions were recommended in respect of the other charges upon which the licensee had been found guilty. It was provided that if certain requirements, as set out in the sanctions, were not met, the licensee would be liable for a fine to a maximum of R40 000,00.
- 5) The CCC's said recommendations to the Authority were approved by the Authority.
- 6) When the licensee later submitted financial statements for the 2006/7 and 2007/8 financial years, Mafica Consulting a company that Imbokodo claimed to have audited

---

its books, denied that it had done so. It also appeared that Mafica Consulting is not registered with the Independent Regulatory Board for Auditors.

- 7) It appears that the licensee thereafter decided to ignore any correspondence from the CCC office or from the Compliance Unit, that it did not comply with the Authority's orders and showed no remorse for failure to adhere to such orders. This appears from a recommendation of the CCC to the Authority dated 6 August 2009. The CCC recommended that a fine of R35 000,00 be levied against Imbokodo, payable on or before 1 November 2009. The CCC's recommendations to the Authority are dated 6 August 2009. Such recommendations were endorsed by the Authority on 24 August 2009.
- 8) Responding to this sanction the Station Manager in a letter dated 12 November 2009 confirmed that the licensee would comply with the order to pay the fine but requested that the amount be remitted by instalments. The CCC recommended to the Authority that Imbokodo be allowed to remit its fine in 7 (seven) instalments of R6 000,00 each over a period of seven months to a total amount of R42 000,00 after a 20% escalation had been added. The first payment had to be made on 31 January 2010 with the last instalment due on 31 July 2010. It was recommended that the 20% escalation be added to indicate the Authority's displeasure for holding the judgment in contempt. This appears from the CCC's recommendation to the Authority dated 9 December 2009. The Authority resolved to endorse the CCC's recommendations on 12 January 2010.
- 9) It appears that Imbokodo was informed of the Authority's decision on 19 January 2010. On 11 March 2010 Ms Mabulu, Coordinator of the CCC, sent an email to Mr Ngema, the Station Manager of the licensee, pointing out that the ruling

---

was that the licensee had to commence instalment payments of R6 000 per month as from 31 January 2010 and requesting proof of payment for January and February 2010. It does not appear that there was any reply to this letter.

- 10) On 1 September 2010 Mr K Mokitle wrote a letter on behalf of the Compliance Unit to Mr Ngema to request audited financial statements for the 2009-2010 financial year, minutes of Imbokodo's last annual general meeting as well as board and management meetings from December 2009 until June 2010, and its detailed complaints report from January 2010 to June 2010. He also pointed out that the radio station was persisting in its failure to comply with the monthly submission of log sheets despite countless efforts to remind the radio station to submit same. He also requested a status report on the payment of the sanction (i.e. the fine) by 3 September 2010.
  
- 11) On 8 October 2010 Mr Mokitle wrote a further letter to Mr Ngema referring to an email from Mr Ngema dated 9 September 2010 (with which we have not been provided). Judging by Mr Mokitle's letter, Mr Ngema made an undertaking that the licensee would pay the first instalment of the fine starting end September 2010 and would pay the rest of the outstanding amount in instalments within six months. Mr Ngema's said undertaking is, however, a clear deviation from the order of the Authority which provided that the first payment had already to be made on 31 January 2010. Mr Mokitle also requested Mr Ngema to submit proof of payment "made at the end of September" and for proof of further payments of the fine before the end of the first week of every month until the fine was paid in full. It was common cause at the hearing that Imbokodo had made no payments to ICASA whatsoever. It must be added that, Mr Mokitle obviously had no authority to enter into any

---

agreement with the licensee which conflicted with the order which had been made by the Authority.

- 12) On 19 October 2010 Mr Mokitle wrote an inter-office memorandum to Ms Hlongwane, Manager of the Compliance Unit in which he summarized the Unit's problems with Imbokodo.
- 13) After the charge sheet in the instant case was received by Imbokodo from Ms L Mabulu, the CCC coordinator, Mr Ngema wrote quite a long letter, dated 19 December 2010, to her in which he stated, *inter alia*, that the current audited financial statements would be submitted after the annual general meeting had taken place. He said that that meeting was supposed to have taken place in June 2010, but was postponed to November 2010 due to the World Cup, and was "also disturbed by the sudden death of the staff member". The annual general meeting would be held in April 2011. In regard to payment of the fine, the following was said: "After the radio station have asked a permission to pay in instalments, the station suffered a serious financial blackout after Sentech and Telkom were shutting down any radio station that is owing them, and it was communicated to the Authority. After that, the radio station requested the payment details of which the radio station has never been given the payment details up to date". No mention was made of any anticipated problems in regard to the holding of the annual general meeting, or that the board of the licensee was dysfunctional and unable to convene an annual general meeting. As will appear below, these matters were for the first time raised at the hearing of the matter.
- 14) The essence of the two charges is that Imbokodo has failed to pay the fines which were imposed by the Authority. Why there are two charges and not one is unclear. It

---

seems to be an unjustifiable splitting of charges. The charge should simply have been that Imbokodo has failed to pay the fine of R42 000,00 which the Authority has imposed. In my view, we should simply treat the two charges as if they are one charge.

- 15) In our view, no reasonable excuse for non-payment of the fine has been offered by Imbokodo. As indicated above, the Authority allowed Imbokodo to pay the amount in instalments of R6 000 per month from 31 January 2010 to 31 July 2010, but Imbokodo failed to pay any amount whatsoever. If Imbokodo was willing and able to pay, it is unthinkable that the absence of "payment details" would have prevented it from making any of the payments which it was bound to do. It is, therefore, guilty of contravening the order which the Authority made, namely that it should pay the fine of R42 000,00 by the 31<sup>st</sup> July 2010.
- 16) Imbokodo is rapidly approaching the situation where it may be found that it has "repeatedly been found guilty of material violations", as set out in s17E(2)(d) of the ICASA Act, which might in turn lead to a suspension or even a revocation of Imbokodo's licence by the Authority.
- 17) In our view, Imbokodo is simply playing for time while making no effort to pay the fine which the Authority has imposed.
- 18) During an adjournment of the hearing Ms Hlongwane and Imbokodo's representatives purported to agree that Imbokodo would pay the fine in monthly instalments of R6 000 from 1 September 2011. However, the Compliance Unit has no standing or authority to amend an order of the Authority. Neither the Committee nor the Authority is bound by such "agreement". The order of the Authority has

---

accordingly not been amended. The full amount of R42 000,00 is long overdue. We recommend that the Authority should warn Imbokodo that it is in default of payment of the amount of R42 000,00 and that if it persists in its failure to pay that amount, the Authority may order the suspension or revocation of Imbokodo's licence in terms of s17E(2)(d) of the ICASA Act.

- 19) It may be that the amount of R42 000,00 bears interest at the legal rate *a tempore morae* (from the time of default) until date of payment. This issue was, however, not raised or argued before us. Accordingly we do not express any views in regard thereto. It may be advisable for the Authority to obtain a legal opinion in regard thereto since this is an aspect which may play a role also in other similar cases where the Authority has imposed fines on licensees but they have failed to pay such fines timeously.
- 20) Imbokodo has not been charged with failure to hold an annual general meeting (AGM). As indicated, Mr Ngema in his letter to Ms Mabulu dated 19 December 2010 stated that the AGM would have taken place in June 2010 but was postponed due to the World Cup, and that it would take place in April 2011. It appears that the AGM has not taken place yet. Because Imbokodo has not been charged with failing to hold an AGM timeously, the Committee did not investigate the reasons why it has not been held. However, after the adjournment Ms Hlongwane submitted that the board of Imbokodo is dysfunctional, and that the Committee should authorise that a steering committee be formed since in the absence of the board, the Station Manager cannot convene an AGM. Mr Ngema, the Station Manager and Ms Gladys Ngema are also in favour of the appointment of a steering committee. However, we were not informed of the reasons why or in what respects the board is dysfunctional. If the board is dysfunctional, a charge should have been brought by the Compliance



---

Unit against the licensee based on such dysfunctionality and the matter would have been fully investigated. It would also be important to determine what the members of the licensee have themselves done to terminate or improve such dysfunctionality.

- 21) Unfortunately these new issues, raised for the first time by Ms Hlongwane at a late stage of the hearing, have obviously not been properly investigated by the Compliance Unit. In the absence of such an investigation and supporting evidence, the Committee cannot find that the Imbokodo's board is dysfunctional, or recommend that the Authority impose a steering committee upon Imbokodo which will in effect supplant its board, even on a temporary basis. Ms Hlongwane, after the hearing, provided the Committee with her submissions in regard to an appropriate order in respect of the appointment of a steering committee. We are, however, for the reasons stated herein, at this stage unable to recommend to the Authority that it should order such a steering committee to be formed.
- 22) If the charge or complaint of the Compliance Unit had been that the board of Imbokodo is dysfunctional, or unable to arrange for an AGM to be held, the Committee would naturally have investigated such complaint. As it is, we are left with numerous unanswered questions in regard thereto. One of these relates to the constitution of the licensee. Although it was not originally amongst the papers provided to the Committee together with the charges, Ms Hlongwane, during the hearing, provided us with a copy of the "Constitution of the Imbokodo Community Station", which we accepted was the constitution of the licensee. However, as will appear below, it appears that it is not the constitution of the licensee.
- 23) A Class Broadcasting Service Licence, dated 24 October 2008, was "granted and issued to Sobonakhona Women's Organisation for the provision of community

---

broadcasting service to be known as Imbokodo Community Radio". (Our underlining)  
The Radio Frequency Spectrum Licence, dated 27 October 2008, shows that it was granted and issued to the same Women's Organisation. Copies of these licences were provided to us during the course of the hearing. They should have formed part of the documents which accompanied the charge, so that we could have studied their contents before the hearing.

- 24) There is, however, no reference whatsoever in the "Constitution of the Imbokodo Community Station" to the Sobonakhona Women's Organisation. This seems very unusual. Why this is so must be fully investigated. No one pointed out this discrepancy during the course of the hearing. We only became aware of it after reserving judgment, when studying the documents handed in during the course of the hearing. Proper supporting documents should accompany a charge to enable the Committee to prepare for the hearing. Unfortunately this was not done in this case.
- 25) Furthermore, no constitution of the Sobonakhona Women's Organisation has been made available to us. It would, of course, be very important to know the provisions of that constitution. We cannot recommend, nor can the Authority impose, a steering committee upon the Women's Organisation without knowing the provisions of its constitution.
- 26) Even if the "Constitution of the Imbokodo Community Station" were the constitution that applies to the licence holder (which on the face of it appears not to be the position), that Constitution seems to be seriously defective in that it does not state who has the right to vote at annual general meetings. Par 8.1 states that community participation must be reflected in the election of the board members, but nowhere is it stated which members of the community have the right to vote. The question

---

remains: Who are the members and what must a member of the community do to qualify as a member? However, as indicated, this Constitution appears to be entirely irrelevant.

- 27) When the Compliance Unit brought complaints against Imbokodo before the CCC on 17 October 2008, the sixth charge read that “Imbokodo FM failed to submit founding documents of the radio station outlining its legal status”. In par 5 of the judgment of the CCC the following was said: “As to charge 6, it was argued by Imbokodo that they had sent in their founding documents. This was denied by the Compliance Unit However, the CCC is of the view that the Constitution of Imbokodo, as attached to the Compliance Unit documentation before it, satisfies the requirement of a common law legal persona and that it suffices as a document which has been filed”. (Our underlining) Presumably, the said “Constitution of Imbokodo” is the same as the one of which Ms Hlongwane provided a copy to us during the hearing. But what constitution formed part of Imbokodo’s founding documents? It is improbable that they contained the “Constitution of the Imbokodo Radio Station” because there is no reference in such constitution to the Sobonakhona Women’s Organisation which, as indicated, is the licensee.
- 28) Apparently the CCC’s attention was not, in October 2008, drawn to the fact that the licensee is the Sobonakhona Women’s Organisation and that that Organisation is not even referred to in the “Constitution of the Imbokodo Community Station”. The question remains unanswered how it came about that the Women’s Organisation is the licensee, without its constitution apparently having being placed before ICASA when the licence was applied for. How this came about should be fully investigated. On the face of it, it seems that it may have been due to poor administration on ICASA’s part.

- 29) In the circumstances this is not a situation where the constitution of a community radio station contains a stumbling block which may be readily and legally overcome by a recommendation in respect of “remedial or other steps” in terms of s17E(2)(c) of the ICASA Act and a consequential order of the Authority. Since we do not know what the constitution of the licensee provides, it would be legally unjustified to make any recommendation to the Authority concerning the appointment of a steering committee.
- 30) We do, however, recommend to the Authority that steps should immediately be taken by the Compliance Unit to obtain the constitution of the Sobonakhona Women’s Organisation. It apparently has a constitution which differs from the one which was placed before the CCC in October 2008, and which was made available to us by Ms loHlongwane during the hearing.
- 31) As indicated above, it was argued on behalf of Imbokodo at the hearing before the CCC on 17 October 2008 that “they had sent in their founding documents” and that this was denied by the Compliance Unit. It is necessary, in our view, that the “founding documents” sent in by Imbokodo to ICASA should be examined to see whether a constitution of the Sobonakhona Women’s Organisation was sent to ICASA or not. If it was not sent, it should be obtained. The relationship between the Women’s Organisation and the Imbokodo Radio Station should be established. If the constitution of the Women’s Organisation is made available, the Compliance Unit should investigate (with the aid of a legally qualified person) whether that constitution is a proper and intelligible one and whether it is factually and legally necessary to appoint a steering committee to supplant the board on a temporary basis in order that an AGM may be held. It may even be that the licences that were granted by ICASA

---

may have to be revoked if it appears that misrepresentations were made to ICASA concerning the identity of the applicant, or its constitution, when the licences in question were applied for.

- 32) It may be that the poor administration of the licensee may be caused by an ineffective constitution, or it may even be that no licences should have been issued to the Women's Organisation, if the abovementioned misrepresentations were made to ICASA when the licences in question were applied for.
- 33) It is essential, in our view, that the Compliance Unit should immediately investigate all the aspects referred to above. They may find new complaints to the Committee.
- 34) We are thankful for the assistance which Ms hHHlongwane and the Compliance Unit have rendered to the Committee, but we must point out that the Compliance Unit clearly lacks capacity to investigate or appreciate the legal aspects of the matter, or to assist the Committee in regard thereto. We refer to what we said in that regard in our recent judgment in the Durban Youth Radio matter. We are not raising this to criticise the Compliance Unit in any way. We are doing so in the interests of better administration and in the interests of the licensee. The problems set out herein are unfortunately directly related to the fact that the Compliance Unit at present clearly lacks the necessary legal expertise to handle matters such as these.
- 35.1) Once Imbokodo has properly reacted to the orders which we recommend, it will hopefully become clear what Imbokodo's constitution provides, whether its board is indeed dysfunctional and whether a steering committee should be appointed by the Authority to supplant the licensee's board.

- 
- 35.2) However, it must be borne in mind that in such matters the Authority cannot simply impose a steering committee on Imbokodo without carefully studying the provisions of its constitution, otherwise it would be interfering with the agreement between the members who created such constitution.
- 35.3) The above observations do not, of course, in any way derogate from Imbokodo's obligations to pay the fine of R42 000,00 immediately.
- 36) We accordingly make the following recommendations to the Authority:
- 36.1) that the Authority should direct the licensee to desist from any further contraventions of the orders of the Authority relating to the payment of a fine of R42 000,00;
- 36.2) that the Authority should direct the licensee to pay the fine of R42 000,00 without any further delay;
- 36.3) that the Authority should warn the licensee that, in view of it having been found guilty repeatedly of material violations, its licence may be suspended, amended or revoked if it persists in failing to pay the amount of R42 000,00;
- 36.4) that the licensee be directed to furnish the Compliance Unit of ICASA within 60 days after the Authority has made its order, with a certified copy of the constitution of the Sobonakhona Women's Organisation, as well as a certified copy of the constitution which the licensee provided to ICASA when it applied for such licences;
- 36.5) that the licensee be directed to explain to the Compliance Unit in writing within 60 days after the Authority has made its order, whether there is a difference between the

---

organisation known as the Imbokodo Community Radio Station and the Sobonakhona Women's Organisation, and if so, full particulars of such difference should be furnished;

- 36.6) that the licensee should be directed to explain to the Compliance Unit in writing within 60 days after the Authority has made its order why it has failed to hold its annual general meeting which should have been held during 2010 and when it anticipates that such meeting will be held;
- 36.7) that the licensee should be directed to explain to the Compliance Unit in writing within 60 days after the Authority has made its order why and in what respects the board of the licensee is allegedly dysfunctional and what the members of the licensee have themselves done to terminate or improve such dysfunctionality;
- 36.8) that the licensee should be directed to explain to the Compliance Unit in writing within 60 days after the Authority has made its order, whether the Authority is entitled, in law, to order that a steering committee should be appointed to supplant the board of the licensee, and, if so, why it is necessary for the Authority to order that such a steering committee should be appointed;
- 36.9) that the Compliance Unit should be directed to furnish a full report to the Authority in respect of the matters mentioned in paragraphs 36.4 to 36.8 hereof, as well as any other relevant matters, as soon as the licensee has reacted to the contents of such paragraphs;
- 36.10) that, after the Compliance Unit has furnished such report to the Authority, the Authority will refer the matters set out in paragraphs 36.4 to 36.8 above, as well as

---

any other relevant matters, to the Complaints and Compliance Committee to investigate, hear if appropriate and make a finding on all such matters, in terms of s17B(a)(i) of the ICASA Act.

Dated at Sandton this 14<sup>th</sup> day of July 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.