COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 25 April 2007 Case number: 1/ 2007

Monitoring and Complaints Unit of the Independent Communications Authority of South Africa **Complainant**

Vs.

Radio Mafisa **Respondent**

Complaints and Compliance Committee Panel

E. K. Moloto- Stofile (Chairperson)
R. Msiza (CCC Member)
S. Thakur (CCC Member)
N. Ntanjana (CCC Member)
D. Moalosi (CCC Member)
J.C.W. Van Rooyen (Councillor)

For the Complainant

Monitoring Complaints Unit Manager: B. Mkhizi

Assisted by: Monitoring officer: K.Mokitle

For the Respondent

Chairperson of the Board: R.Ramatlhape

Station manager: L. Mediwane

Treasurer of the Board: D..Sefora

Secretary of the Board: V.Fongoma

Deputy Secretary: Ma Segano

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[1] In terms of s 17C of the ICASA Act 13 of 2000 as amended

SUMMARY

Complaint against Radio - The Monitoring Unit of the Independent Communications Authority of South Africa filed a complaint with the Complaints and Compliance Committee against *Radio Mafisa* for its having paid emoluments to Councillors on its Board for meetings, without proper authorization. The MCU received complaints from members of the community involved that these payments were not duly authorized.

Held, on the facts, that the allegation that the Board members of the Community Broadcasting Station had been improperly and unreasonably remunerated was unfounded. Complaint dismissed.

Complaints and Compliance Committee – independence and impartiality of CCC discussed in the light of both monitoring and adjudicating powers being granted to the Authority.

Held that the CCC is independent and reasonably perceived to be impartial based on the factual separation of the CCC from the monitoring function of the Authority and the reasonable apprehension test, which was formulated as follows in the light of guidelines of the Constitutional Court and the Supreme Court of Canada, namely, that of the "reasonable, informed person viewing the matter realistically and practically – and having thought the matter through." This was held to be a realistic test. The CCC complied with this test since it is not required to monitor and, in so far as it is required to "investigate," that this function is interpreted in line with the Constitutional requirement that there must be a separation between adjudicative and monitoring functions; accordingly that it means "inquire" without monitoring or investigating in the sense of inspection and the like. The process is an adversarial one between the complainant (*in casu* the Monitoring Unit of ICASA) and the broadcaster or, in other cases, a licensee or a postal operator.

JUDGMENT

JCW van Rooyen SC

[1] *Radio Mafisa* is a Community Radio, licensed by the Independent Communications Authority of South Africa (ICASA). The Monitoring and Complaints Unit ("MCU") of ICASA has been involved in correspondence with Radio Mafisa and has decided to file a number of complaints against the station before this Committee, the Complaints and Compliance Committee ("CCC"), a committee set up by the Council of the ICASA in terms of s 17C of the ICASA Act. Before the hearing Mr. *Mkhize*, who put the case on behalf of the MCU, informed the Committee that he had had discussions with *Radio Mafisa* representatives and that he had decided to limit the complaint to the allegation of improper payment of emoluments to board members.

[2] The CCC deems it necessary to address concerns that stakeholders might have regarding the substantial successful constitutional challenge to its authority, as set out in a the judgment in the Witwatersrand Local Division of the High Court,[2] one day after the CCC had come to a conclusion on the above complaint, after having heard the matter. The Court's judgment has been referred to the Constitutional Court for confirmation and is, accordingly, not final at this stage. The CCC has decided to proceed with the judgment in this matter, based on its view of its functions and its position vis-à-vis the Council and the Monitoring Division of ICASA. The CCC could only proceed if it is convinced that the legal and factual position supports its continuance with this and other matters, pending the outcome of the judgment of the Constitutional Court. The CCC has come to the conclusion that it is entitled and, in fact, under a duty, to continue with its functions. The full reasoning is set out in the Annexure to this judgment, which should be regarded as a part thereof.

[3] Reverting to the complaint before the CCC in this matter. One of the licence conditions of the community broadcaster reads as follows:

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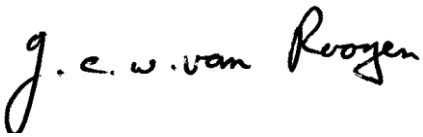
[2] *Radio 786 v Independent Communications Authority of South Africa and Others* [case 06/3431 WLD 26th April 2007].

" The licensee shall not pay a dividend to any of its Board members, directors, trustees, management or staff. This does not preclude the payment in good faith of reasonable remuneration for services rendered to the licensee."

The Chairperson of the Board of *Radio Mafisa*, with the assistance of the member responsible for the finances of the broadcaster, informed the CCC that remuneration was indeed paid to the members of the Board. The remuneration was authorised properly in terms of the statutes of the station and related to Board meetings, other work authorised by the Board and costs. The CCC is satisfied that there was no irregularity in the payments and that the amounts paid were reasonable and paid in good faith, as required by the license conditions.

The complaint is, accordingly, dismissed.

The Chairperson, Ms Moloto-Stofile and Committee Members R. Mokwena-Msiza, N.Ntanjana, D.Moalusi and S.Thakur concurred in the above judgment.



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JCW van Rooyen

For: CHAIRPERSON OF THE CCC

24 July 2007

ANNEXURE

The above judgment of the CCC in *Mafisa* was decided on the 25th April 2007, one day before the 26th April 2007 judgment of the WLD.[3] Since the CCC had already discussed its position in regard to its independence and impartiality before the 25th, it is important that the CCC's position be clarified. This position was indeed the approach of the CCC when, on the 25th April 2007, it heard a complaint from the Monitoring Unit of the ICASA.

Introduction

[1] Since this is the Complaints and Compliance Committee's first judgment, it is necessary to set out its approach as to the powers vested in it and whether it is independent from the Council of the Authority and would reasonably be perceived to be impartial so that fair administrative justice may be ensured. It is a principle of fair administrative justice that a person should receive a hearing before a tribunal which is not only independent, but is also reasonably perceived to be independent and impartial.[4]

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[3] *Radio 786 v Independent Communications Authority of South Africa and Others* [case 06/3431 WLD 26th April 2007].

[4] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147(CC);*South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing*) 2000(3) SA 705(CC) at para [12]-[17] per Cameron AJ. In *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 S.C.R. 3 Lamer CJ states at para. 80: "…it is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent… the principles for judicial independence outlined in *Valente* [*R v. Valente*, [1985] 2 S.C.R. 673] are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties." Quoted from Laverne Jacobs, **"**Tribunal Independence and Impartiality:Rethinking the Theory after *Bell* and *Ocean Port Hotel* – A Call for Empirical Analysis" in Laverne A. Jacobs & Anne L. Mactavish., eds., *Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice* (2001-2007) (Montreal: Les Éditions Thémis, 2007) (forthcoming) and further : "Even though Régie heralded its use for adjudicative bodies, the courts have made no explicit refusal to apply the doctrine, in its more flexible form, to tribunals that are more regulatory and investigative in nature.

See for example Alex Couture Inc. v. Canada (A.G.) (1991) 83 D.L.R. (4th) 577 (Q.C.A.) [Alex Couture] involving the Competition Tribunal and *Katz v. Vancouver Stock Exchange* (1995), 14 B.C.L.R. (3d) 66

In considering this issue it is particularly informative to consider the approach which the Canadian courts have taken in this regard. This is so since there are a number of statutory institutions in Canada where monitoring and judicial functions are exercised under the same umbrella and judgments have been handed down in this regard by Canadian Courts.[5] In so far as the test for independence and impartiality is concerned, the Canadian test is that of the " reasonable well-informed person viewing the matter realistically and practically – and having thought the matter through."[6] This is, with respect, a realistic test which is also significant for this judgment.

[2] Two matters will have to be considered: firstly what legislative and constitutional guarantees exist for the independence and impartiality of the Complaints and Compliance Committee ("CCC") and, secondly, what the operational practice of the CCC is within the wider ambit of the Independent Communications Authority of South Africa, which was established by Act 13 of 2000, as amended. In so far as operational practice is concerned, the approach of Sopinka J, writing for the majority in the Canadian Supreme Court in *Canadian Pacific Ltd.* v. *Matsqui Indian Band* [7] is of particular significance:

"It is not safe to form final conclusions as to the workings of this institution on the wording of the by-laws alone. Knowledge of the operational reality of these missing elements may very well provide a significantly richer context for objective consideration of the institution and its relationships. Otherwise the administrative law hypothetical "right-minded person" is right minded, but uninformed."

(C.A.); aff'd [1996] 3 S.C.R. 405. See also *Valente* in which the court first held that a flexible degree of judicial independence should be applied to a 'variety of tribunals' (*Valente* at para. [25])".

[5] The Québec Charter Human Rights and Freedoms requires that "every person has a right to a full and equal , public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him." S 34 of the Constitution of the Republic of South Africa similarly provides: " Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum" Also see s 33 which guarantees that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[6] As pointed out by Prof Laverne Jacobs **"**Tribunal Independence and Impartiality: Rethinking the Theory after *Bell* and *Ocean Port Hotel* – A Call for Empirical Analysis" in Laverne A. Jacobs & Anne L. Mactavish., eds., *Dialogue Between Courts and Tribunals – Essays in Administrative Law and Justice (2001-2007)* (Montreal: Les Éditions Thémis, 2007) (forthcoming) (presently to be found on http://www.ciaj-icaj.ca/english/administrativetribunals/IndependenceFeb2004.pdf): "although this test was formulated by de Grandpré J in *Committee for Justice and Liberty v National Energy Board* [1978] 1S.C.R. 369 at 394 in dissent, this test has been used throughout the jurisprudence on judicial and tribunal independence and was cited by the Supreme Court of Canada as recently as in *Bell Canada v Canadian Telephone Employees Association* [2003] 1 S.C.R 884 at para [17].

[7] [1995] 1 S.C.R. 3.

Establishment of the CCC

[3] Although the ICASA Act ("the Act") widely refers to the "Authority" – which would comprise all the facets of quite a large organ of state with more or less three hundred employees and nine councillors – the Authority, according to s 3(2) of the Act, acts through its Council on which the nine councillors sit. One of the functions of Council is to establish the CCC. S17A of the ICASA Act provides as follows:

> (1) The Authority must establish a Complaints and Compliance Committee which consists of not more than seven members, one of whom must be a councillor.[8]
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> (2) The chairperson of the Complaints and Compliance Committee must be -
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> (a) a judge of the High Court of South Africa, whether in active service or not;
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> (b) an advocate or attorney with at least 10 years' appropriate experience; or
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> (c) a magistrate with at least 10 years' appropriate experience, whether in active service or not.
>
> (3) The chairperson of the Complaints and Compliance Committee must –
>
> (a) manage the work of the Complaints and Compliance Committee; and
>
> (b) preside at hearings of the Complaints and Compliance Committee.
>
> (4) A member of the Complaints and Compliance Committee must be a fit and proper person and must -
>
> (a) have suitable qualifications and experience in communications, economics, electronic engineering, broadcasting, law, commerce, technology or public policy;
>
> (b) be committed to the objects of this Act and the underlying statutes;
>
> (c) not be an office-bearer or an employee of any party, movement or organisation of a party-political nature;
>
> (d) not be an unrehabilitated insolvent;
>
> (e) not be mentally ill or disordered;
>
> (f) not have been convicted of an offence after the commencement of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) and sentenced to imprisonment without the option of a fine; and

[8] The Councillor who is appointed on the CCC would, of course, have to recuse him- or herself from such a resolution. This principle was indeed applied when the CCC was appointed and it was proposed to Council that Councillor JCW van Rooyen SC be appointed.

(g) not be subject to any disqualification contemplated in s 6 and be subject to the provisions of s 12.[9]

The CCC as "Committee"

[4] Although the CCC is referred to in the Act as a "committee" it is not a "committee" of Council as are the other committees of Council established by Council in terms of s 17 of the Act. The powers of these committees are delegated or assigned to them and may, with one exception,[10] be amended or revoked at any time by Council.[11] By contrast, the powers of the CCC are set out in the Act and are not delegated or circumscribed by the Council and may, accordingly, also not be revoked or amended by Council. When the CCC has adjudicated a matter it informs Council of its finding on the merits of the complaint and recommends what "action" should be taken by Council. S 17E then sets out what the powers of Council are and what the possible recommendation from the CCC may be. The powers of Council do not relate to the "finding" and the finding is, accordingly, before Council as a *fait accompli*; s 17E only deals with the *action* - the sanction - which is recommended and how a decision is taken by Council in this regard. It reads as follows:

17E. Decision by Authority

(1) When making a decision contemplated in s 17D, the Authority must take all relevant matters into account, including -

(a) the recommendations of the Complaints and Compliance Committee;
(b) the nature and gravity of the non-compliance;
(c) the consequences of the non-compliance;
(d) the circumstances under which the non-compliance occurred;
(e) the steps taken by the licensee to remedy the complaint; and
(f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.

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[9] These sub-sections, in essence, require independence and an absence of conflict of interest by setting out a number of disqualifications generally or in a particular case.
[10] In a case where it affects a licence – see s 4(4)(e).
[11] See s 4(4)(d)

(2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

(a) direct the licensee to desist from any further contravention;

(b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

(c) direct the licensee to take such remedial or other steps in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

(d) where the licensee has repeatedly been found guilty of material violations -

(i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subs for a period in excess of 30 days; or

(ii) amend or revoke his or her licence; and

(e) direct the licensee to comply with any settlement.

(3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subss (1) and (2) and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority within 60 days.

(4) The Authority must make a decision permitted by this Act or the underlying statutes and provide persons affected by such decision with written reasons therefor.

[5] Council's authority is limited to a consideration of the recommendation as to sanction. It may not revoke or amend the *finding* on the merits of a complaint by the CCC. Also when the Authority (Council) refers a matter to the CCC for an opinion in terms of s 17B (a) (i), there is no delegation. The recommendation required in terms of s 17B (b) does not relate to complaints, but relates to the performance of the Authority's functions or a matter incidental to the achievement of the objects of the Act. Once the recommendation is made, it has the same value as an opinion and the non-acceptance of the opinion would not affect the standing of the CCC as an entity separate from Council.

[6] Independence and impartiality of CCC members are, of course, crucial. If compliance with this Constitutional requirement is approached from a literal point of view in s 4(4) of the Act, which sets out the aims of the Authority, the conclusion could be reached that the Authority is monitor, investigator and adjudicator. However, if the nature of the CCC is considered as a separate entity appointed by the "Authority", the qualifications for its members, the circumstances under which a member has to recuse him- or herself, the final say which the CCC has on the merits of a matter before it, the power which the Council has to appoint its own administration to assist it in the performance of its functions subject to the Council's direction and supervision, the difference between the latter employees and the CCC members, who are not employees, the differentiation in the aims of the Authority between monitoring in one aim and investigation and adjudication in another aim and lastly, the steps taken internally (in line with the thinking of Sopinka J[12]) to ensure that the CCC functions on its own and the monitoring takes place by employees, a different perspective should, with respect, be gained.

Tenure

[7] Security of tenure is an important element of independence. Judges who are appointed for life would, of course, comply with this requirement. They may only be removed from office by the President upon address by both Houses of Parliament in cases of misbehaviour or incapacity.[13] The Supreme Court of Canada has held that in so far as tenure is concerned, the strict requirements as to tenure for a judge do not apply to members of quasi judicial tribunals. Gonthier J states as follows in *Québec Inc. v Québec (Régie des permis d'alcool)*[14]*:*

"In my view, the directors' conditions of employment meet the minimum requirements of independence. These do not require that all administrative adjudicators, like judges of courts of law, hold office for life. Fixed term appointments, which are common, are acceptable. However, the removal of the adjudicators must not simply be at the pleasure of the executive. Le Dain J summarized the requirements of security of tenure as follows in *Valente:*

'…that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(d) is a tenure, whether until an age of retirement, for a

[12] Supra note 3.
[13] See s 174(7) of the Constitution and s 10(7) of the Supreme Court Act 59 of 1959, as amended.
[14] [1996] 3 SCR 919 paragraphs [67] to [68]; ; also see *Sam Lévy & Associés Inc. v. Mayrand* [2006] 2 F.C.R. 543 (Fed. Ct.). (Decided May 16, 2005, per Martineau J.)

fixed term or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner."

In the case at bar, the orders of appointment provide expressly that the directors can be dismissed only for certain specific reasons. In addition it is possible for the directors to apply to the ordinary courts to contest an unlawful dismissal. In these circumstances, I am of the view that the directors have sufficient security of tenure…since sanctions are available for any arbitrary interference by the executive during a director's term of office."

Unless a disqualification in terms of s 6 of the ICASA Act becomes applicable to a CCC member, he or she remains in office for the whole period of appointment, which is three years according to the letters of appointment of the CCC.[15] No provision provides for his or her dismissal. The Councillor on the CCC may, as is the case with other Councillors, only be discharged by the National Assembly on limited grounds in terms of s 8(2) of the Act. These factors underpin the independence of the CCC and, judged by the Canadian approach, which is, with respect, sound and practical, the CCC members are independent also in so far as tenure is concerned.

Adjudication and Monitoring functions

[8] The next question is whether a combination of monitoring, investigative and adjudicating powers in the "Authority", according to its aims as set out in s 4 of the Act, amounts to an impermissible mixture of adjudication and monitoring.

[9] In s 4(3) of the Act several duties of the Authority are determined by Parliament. Two of the duties are:

"The Authority –

(b) must *monitor* the electronic communications sector to ensure compliance with this Act and the underlying statutes;[16]

(n) must *investigate* and *adjudicate* complaints submitted in terms of this Act, the underlying statutes, and licence conditions. (emphasis added)

[10] S 17B (a) stipulates what the main function of the CCC is:

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;

[15] The Act is silent on the length of the term. The Council decided to appoint the members for three years.

[16] The Electronic Communications Act 36 of 2005, the Broadcasting Act 4 of 1999 and the Postal Services Act 1998.

(ii) complaints received by it; and

(iii) allegations of non-compliance with this Act or the underlying statutes received by it; and

(emphasis added)

[11] Monitoring is, according to the *ipsissima verba* of s 17B(a) not a function of the CCC. However, investigation is one of its functions, as appears from the above. A question is whether the word "investigate" might effectively place the full monitoring function under the CCC. In *Québec Inc. v Québec (Régie des permis d'alcool)*[17] it was held by the Supreme Court of Canada that since the lawyers of the *Régie*[18] were involved both in the investigation and also advised the *Régie*, it amounted to an impermissible combination of functions.[19] From the judgment it appears that if measures or practical

[17] [1996] 3 S.C.R. 919 ("*Régie").*

[18] The Québec liquor licensing board.

[19] See *Régie*: "[54] This detailed description of the Régie's structure and operations shows that the issue of the role of the lawyers employed by legal services is at the heart of this appeal. In my view, an informed person having thought the matter through would in this regard have a reasonable apprehension of bias in a substantial number of cases. The Act and regulations do not define the duties of these jurists. The Régie's annual report, however, and the description of their jobs at the Régie's, show that they are called upon to review files in order to advise the Régie on the action to be taken, prepare files, draft notices of summons, present arguments to the directors and draft opinions. The annual report and the silence of the Act and regulations leave open the possibility of the same jurists performing these various functions in the same matter. The annual report mentions no measures taken to separate the lawyers involved at different stages of the process. Yet it seems to me that such measures, the precise limits of which I will deliberately refrain from outlining, are essential in the circumstances. Evidence as to the role of the lawyers and the allocation of tasks among them is incomplete, but the possibility that a jurist who has made submissions to the directors might then advise them in respect of the same matter is disturbing, especially since some of the directors have no legal training. In this regard, I agree with Brossard J. A. (at p. 581 D. L.R.):

[TRANSLATION] The appellants invite us to presume that their opinions are general or related to the administrative functions of the directors and point out that the Régie's annual report does not establish the existence of any practice by which the prosecuting lawyers would also be called on to give legal opinions in the context of the exercise of the directors' adjudicative function. However, the report does not rule out this possibility. Yet in matters of institutional bias, it is the reasonable apprehension of the informed person that we must consider and not the proven or presumed existence of an actual conflict of interest.

[55] Furthermore, the courts have not hesitated to declare on the basis of the rules of natural justice that such a lack of separation of functions in a lawyer raises a reasonable apprehension of bias. In *Re Sawyer and Ontario Racing Commission* (1979), 24 O.R. (2d) 673 (C.A.), for example, the lawyer who presented the administrative agency's point of view subsequently took part in the review of the reasons for the decision. Brooke J.A. described the role of that lawyer as follows, at p.676:

safeguards had been taken by the *Régie* to ensure that the functions were separated, the Court would not have found a reasonable apprehension of bias to exist.[20]

The position taken by the CCC at its first planning meeting this year was that if monitoring were to fall under the CCC, it would mean that the judicial function and the monitoring function would be interwoven with each other and that such an approach to the functions of the CCC would be in conflict with s 34 of the Constitution of the Republic of South Africa, which requires independence and impartiality when a judicial function is exercised. It would also be in conflict with just administrative action as required in s 33 of the Constitution if the functions were not performed independently from each other. Discussions with members of the Monitoring and Complaints Unit ("MCU") followed and it was established and confirmed that:

(1) the MCU functions independently from the CCC;

(2) the MCU would place a *prima facie* case (where it has *e.g.* investigated the matter *mero motu*) before the CCC in a public hearing and be represented by counsel or by one of the employees of ICASA;

(3) after evidence is led and argument is heard from both parties, the CCC would come to its decision and hand down its judgment in due course.

The process would, accordingly, be adversarial. In matters where there is a complaint from the public, the complainant would be the applicant before the CCC and the respondent broadcaster or other licensee or a postal courier would be the respondent. When a matter is brought before the CCC in terms of s 40 of the Electronic Communications Act, the parties to the interconnection agreement would also be the parties before the CCC. Lastly, although the ICASA Act does not require this, the CCC

But there is no doubt that his role was to prosecute the case against the appellant and he was not present in a role comparable to that of a legal assessor to the Commission ….. He was counsel for the appellant's adversary in proceedings to determine the appellant's guilt or innocence on the charge against him. It is basic that persons entrusted to judge or determine the rights of others must, for reasons arrived at independently, make that decision whether it or the reasons be right or wrong. It was wrong for the Commission, who were the judges, to privately involve either party in the Commission's function once the case began and certainly after the case was left to them for ultimate disposition. To do so must amount to a denial of natural justice because it would not unreasonably raise a suspicion of bias in others, including the appellant, who were not present and later learned what transpired."

[20] See footnote 18 above.

members were also sworn in by a retired Judge President of the High Court.[21] At the heart of the statement of a member lies his or her independence and impartiality.

[12] However, is it legally permissible (especially in the light of the word "investigate") for the CCC, as a Tribunal, to not involve itself in anything more than the objective and impartial adjudication of complaints, whether it be brought before it by the monitoring officials of ICASA, a member of the public, a party to an interconnection agreement,[22] a political party during an election period[23] or a competitor[24] in the electronic sector?

[13] The question is one of interpretation. S 39(2) of the Constitution obliges a court, tribunal or forum when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. It should, of course, be borne in mind that Parliament is the major engine in law reform and that a court or tribunal should take care not to usurp that function.[25] In *Director of Public Prosecutions, Cape of Good Hope v Robinson*[26] Yacoob J said the following in regard to the scope within which s 39(2) is permitted to be applied:

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[21] I…..do hereby swear/solemnly and sincerely affirm and declare that I will, in my capacity as a member of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa, administer justice to all persons without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the Constitution of the Republic of South Africa and the applicable legislation and common law.

[22] See s 40 of the ECA.

[23] See s 59 of the ECA.

[24] See s 67 of the ECA.

[25] Ackermann J and Goldstone J described this duty (in regard to developing the *common law*) in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995) at para [36] as follows: "In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary. . . . (T)he (interim Constitution) brought into operation, at one fell swoop, a completely new and different set of legal norms. In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We should add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under s 39(2)."

"[53] Thirdly, the Court erred in concluding that the provisions of s 39(2) of our Constitution required a court to construe the phrase so that the power contended for by the respondent is provided for by it. There is nothing constitutionally objectionable in a statutory scheme that requires the magistrate to determine whether the person sought to be extradited has been convicted of an extraditable offence and thereafter to grant the Minister a discretion, including a discretion to determine whether it is in the interests of justice to extradite any person. Nor is it appropriate to determine whether a law is objectionable on the basis of an underlying apprehension that members of the Executive entrusted with making certain decisions will not do it properly. It was this apprehension which motivated the statement that members of the Executive have been known to have been fallible.

[54] Fourthly, the High Court misconceived the extent of its power to construe a legislative provision consistently with the Constitution. A Court's power to do so is not unqualified; a Court cannot give a meaning to the provision which it regards as consistent with the Constitution without more. The provision concerned must be reasonably capable of the preferred construction without undue strain to the language of the provision.[27] The words 'liable to be surrendered', in their context, are incapable of bearing the meaning contended for." (emphasis added)

[14] In the process of interpretation it is firstly clear that the CCC is an entity separate from the Council – in fact the Council establishes it in terms of s 17A(1) and may refer a matter to it in terms of s 17B(a)(ii). The Council has no authority over it and must accept its findings on the merits of the complaint. The very fact that a Judge or a senior lawyer is required to be the chair of the CCC, also points towards the independence of the CCC. If a councillor of ICASA were to have been involved in the monitoring or preparation of the case, he or she will also not be permitted to sit on the Council[28] in terms of s 12(1)(b) of the Act which provides:

(1) A councillor may not vote at, attend or in any other manner participate in, any meeting or hearing of the Council, nor be present at the place where the meeting is held, if … (b)in relation to any matter before the Council, he or she has any interest which may preclude him or her from performing his or her functions as a councillor in a fair, unbiased and proper manner.

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[26] 2005(4) SA 1 (CC).

[27] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) (1996 (4) BCLR 449) in para [59] and the authorities referred to in n 87 thereof; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC) (1996 (1) SACR 572; 1996 (4) BCLR 592) in para [18]; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) in para [85]; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079) in paras [22] - [26]; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening*) 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109) in para [24]; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae*) 2005 (1) SA 530 (CC) in para [27].

[28] When sanction is considered.

This disqualification also applies to CCC members in terms of s 17A(4)(g) of the Act. The word "interest" has a meaning wider than a proprietary interest, since the disqualification under s 12(1)(a) deals with proprietary interests.

[15] It is true that s 4(3)(m) provides that the "Authority" must *investigate* and adjudicate, but the general nature of s 4, which sets out the aims of the Authority, is then clarified by s 17A(1). This function is to be performed by the CCC. Although the CCC is called a "committee" it is not a committee of Council as provided for in s 17. Its functions are not delegated or assigned to it. Its functions and powers are directly bestowed upon it by Parliament in s 17B of the Act and its procedure is spelt out in s 17C or, where necessary, by regulations issued by the Council. It makes a *finding* on the merits of the matter before it and *recommends* what *action* should be taken by Council. This action is described in s 17E(1) and it clearly pertains to *sanction* only. The Council has no authority to set the finding on the merits by the CCC aside. The decision on the merits is final and only subject to review by the High Court, as is also the decision of the Council on sanction. The fact that the Council and the CCC both decide on different aspects of the same case, does not unite the Council and the CCC into one entity.

[16] Since "monitoring" in s 4(3)(b) of the ICASA Act is clearly distinct from "investigation" and "adjudication" in s 4(3)(n) as quoted above, the first guideline in determining the function of the CCC is that it does not *monitor*. Only the investigative and adjudicating functions are repeated in s 17B of the ICASA Act, which reads as follows:

> 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;

The CCC also has a recommending function as to matters referred to it by the Authority. For purposes of the present judgment it is not necessary to dwell on this function of the CCC, which is, in any case, not foreign to the judicial function.

The CCC, otherwise than its predecessor, the Broadcasting Monitoring and Complaints Committee, is not authorised to initiate a matter itself. Matters must either be referred to it or received by it. This new approach to the function of the CCC, also emphasises Parliament's intention not to involve the CCC at the monitoring level.

[17] A closer look at the word "investigate" is necessary. Given the task of *adjudication* as expressly mentioned in s 4(3)(n), which follows upon investigation, it would be incorrect to attribute a negative meaning to "investigate" in the sense that it is necessarily in conflict with the judicial function. "Investigate" has two meanings according to the *Shorter Oxford English Dictionary:* (1) to search or inquire into; to examine systematically or in detail. (2) to make search; to reconnoitre; to scout; to inquire systematically, to make investigation. The wider "searching" meaning would imply the gathering of information. The wider meaning would come close to monitoring, which is clearly omitted from s 4(3)(n), compared to s 4(3)(b). It would, accordingly, be reasonable in the light of the Constitutional division between the prosecuting and adjudicating functions[29] to limit the meaning of "investigate" to the meaning which is the closest to adjudication and that would be "to inquire systematically or in detail." Such an interpretation would not permit monitoring or going further than judging the case brought before the CCC. "To inquire" is, in any case, not foreign to the judicial function – see e.g. s 112(1)(b) of the Criminal Procedure Act 51 of 1977.

[18] The fact that the Council may make regulations as to the procedure of the CCC or issue codes of conduct which the CCC must apply, does not have an impact on the independence or impartiality with which the CCC reaches its decisions. Council cannot, in any manner, interfere in the interpretation which the CCC attaches to the Codes when deciding the merits of the complaint. As a matter of practice, the Councillor on the CCC recuses him-or herself from taking part in the approval of such a Code or Regulations at Council level.[30] This conclusion is supported by the approach of the Supreme Court of Canada. That Court held in *Bell Canada v. Canadian Telephone Employees Association*[31]

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[29] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).

[30] There would be no problem if the proposed Code or procedural Rules were to be sent to the CCC for its comment before approval by Council.

[31] [2003] 1 S.C.R. 884.

that the fact that the Human Rights Commission issued guidelines as to how the Human Rights Act should be interpreted both by the Commission and the Tribunal, did not affect the independence or impartiality of the Human Rights Tribunal. This was so in spite of the fact that the Human Rights Commission was one of the parties before the Tribunal.[32]

[19] Does the fact that a Councillor sits on the CCC impact on its impartiality or independence? As long as the Councillor was not involved in the process by way of which the matter was brought before the CCC, a reasonable inference of bias as per the test set out by the Supreme Court of Canada (a reasonable, informed person considering the matter realistically and practically – and having thought the matter through) would not be justified. The members of the Monitoring Unit are, of course, appointed by Council and they are employees of the Authority. Once again, as long as the Councillor was not involved in the process by way of which the matter was brought before the CCC, a reasonable inference of bias, applying the above test, would not be justified. When the Council considers sanction as recommended to Council by the CCC, the councillor on the CCC must also recuse him-or herself.

[20] A Councillor is also not a co-employee of a monitoring employee. He or she is appointed by the Minister after approval by the National Assembly and is not an employee of the Authority. He or she is a constituent member of the decision-making council of an organ of state. The Authority is in terms of s 181(5) of the Constitution, accountable to the National Assembly and must report on its activities and the performance of its functions to the National Assembly at least once a year. So as to give effect to this obligation, ICASA annually presents to the Minister in terms of s 16 of the ICASA Act its Annual Report, its Financial Statements and the Auditor-General's Report on those statements. The Minister tables the said reports to Parliament within 30 days when it is in session or, when it is not in session, within 14 days after the start of the next ensuing session of Parliament. Accountability may, however, never compromise independence. The Council's, independence is crucial to the performance of the functions of Council.

[32] See *Bell* , *supra* and Laverne Jacobs (note 6 *supra*).

The conclusion is, accordingly, that the CCC functions as an independent and impartial tribunal and that this is supported by the interpretation of the ICASA Act and separation in practice of the monitoring function from the adjudication function.