

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 28 August 2008

Case number: 22 / 2008

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

Complainant

vs.

Moretele Community Radio

Respondent

Complaints and Compliance Committee

IWB De Villiers J (Acting Chairperson)
N Ntanjana (CCC Member)
T. Matshoba (CCC Member)
PA Delport (CCC Member)
J.C.W. Van Rooyen SC (Councillor)

For the Complainant

Ms Fikile Hlongwane (Manager): Monitoring and Complaints Unit assisted by
Ms N Dube and Ms L Mabulu

For the Respondent

Mr. Tshiane (Attorney)
Ms. MM Mashigo (Board Member)
Mr. SI Mokgara (Board Member)
Mr. T Masela (Station Manager)

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

JUDGMENT

JCW VAN ROOYEN

[1] Radio Moretele is a licensed community broadcaster. The Monitoring and Complaints Unit of ICASA has filed charges with the Complaints and Compliance Committee (“CCC”) that the station has contravened its license conditions in five respects. Shortened, the charges state:

- (1) Condition 8.1 – the licensee has not formed formal structures with the listener community so as to obtain its input as to programming;
- (2) Condition 9.2 – the licensee has lent money to a board member;
- (3) Condition 9.4 – the licensee has failed to file audited financial statements;
- (4) Clause 10.12 of the Constitution of Moretele Community Radio – the licensee has failed to hold an AGM and consequently a new Board has not been elected;
- (5) The licensee currently has two Board members who claim to be the Chairperson.

[2] From the testimony of the Complaints Officer, Ms Mabulu, and also from statements of the station manager and the two Board members who both claim that he or she is the Chair of the Board of Radio Moretele, it is clear that as from at least November 2006 Radio Moretele has been subject to disagreement, conflict, strife and poor administration. In fact, the Board was suspended by the community from November 2006 to May 2007 at a General Meeting. There have also been problems in the relationship with the station manager and as to how money was spent. The station manager, conversely, is also not happy with how the station is run. For the last two financial years there are no *audited* financial statements (the two reports filed with the CCC at the hearing amount to reports by a bookkeeping/accounting firm or the like). To put it succinctly: it is a miracle that the station has remained on air.

[3] In his cross-examination of the Complaints Officer the legal representative of Radio Moretele firstly argued that his instructions were that ICASA had neglected to provide sufficient or any instruction to the Board and management and secondly, that there are allegations that the Complaints Officer, in 2006, had contributed to the strife by taking sides with the station manager, whom he had known earlier. It should be pointed out that Ms Mabulu was not, at the time, the Complaints Officer for the station.

[4] In cross-examination Ms Mabulu, rightly, pointed out that ICASA has no duty to train personnel of Radio Moretele. However, as a matter of *Batho Pele*, assistance was given. There were, in any case, other organizations and specialists which were available to provide such assistance at the request of Radio Moretele. As to the allegation that the 2006 complaints officer sided with the manager: there is no admissible evidence of such intervention and the allegation is rejected.

[5] In so far as the charges are concerned, Radio Moretele pleaded guilty to charges 1 to 4. On the fifth charge it was pointed out by Mr Tshiane that Ms Mashigo was presently the Chair of the Board after the Board had dismissed Mr Mokgara as Chair. Mr Mokgara pointed out that he was unhappy with the procedure followed by the Board and that that was the reason why he was claiming to be the Chair. It is indeed so that it would not seem as if the Board dealt with this matter in an appropriate style. Conversely, the Constitution simply states that the Board elects its own chair. If a motion of no confidence was passed, it would not seem improper for a Board to dismiss its chair. However, it is not necessary to pursue this matter further: Mr Mokgara has indicated to the CCC at the hearing that he was prepared to bury the hatchet and would possibly make himself available for re-election for the next Board, if the Council of ICASA were to decide to order Radio Moretele to hold an AGM, which would, in any case, have to be held soon since no AGM has been held for quite a time. The charge that there were two persons claiming to be the chair is struck from the charge sheet. Ms Mashigo is to remain the Chair up to the AGM. Of course, she may make herself available for election in the next term.

[6] As to the charge concerning participation of the community in programming, we need not say more than that it is clear that Radio Moretele has done nothing in this regard and that its plea of guilty was justified. It should be pointed out that in so far as the conditions also require that the *community* as such must take part in the management of the station, the Supreme Court of Appeal has ruled in *Radio Pretoria v Chairperson ICASA & Others* 2008(2) SA 164(SCA) at para [22] that in so far as a section 21 company is concerned, only members who have properly registered in terms of section 21 may vote. We accept that no section 21 company was ever formed by Radio Moretele since no founding documents were provided to ICASA. It would seem inappropriate, given the strife and other problems at Radio Moretele, to require that such registration should take place at this stage. We accept in favour of the Radio Moretele that it has been functioning as a common law legal persona, the

existence of which is, in any case, based on the Constitution of the station, as poorly drafted as it is and even if it does not have formally registered members presently. (See *Ahmadiyya Anjuman Ishaati-Islamlahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983(4) SA 855(C) at 860-863; and also *Morrison v Standard Building Society* 1932 AD 229). We have, however, emphasized to the Board members and station manager present at the hearing that the Constitution requires that only *members* may vote and that they should, without wasting any time, make the listeners aware that only members may vote. Members of the listener community may register and they would be able to vote at the next AGM. It must be emphasized that the concept of a community radio belonging to the listener community must come to an end. It has no standing in law and has led to unjustified intervention by communities in the affairs of some community radios. Once a Board is elected by registered members at an AGM the *Board* is in charge and it only reports to ICASA, the duly appointed auditors and to a duly constituted AGM or Special General Meeting. It is clear that the suspension of the Board in November 2006 was irregular, since it now appears that Radio Moretele has no registered members. We need not express a view on the latter point since we will, as will appear hereunder, recommend that the Council of ICASA order Radio Moretele to advertise that such membership is a requirement to vote at general meetings of Radio Moretele and that, at the next AGM, only registered members may vote.

[7] As to charge two, it is clear that there was no contravention of the licence condition as such. The money lent to a Board member does not amount to a contravention of the *license* condition. No dividends were paid. However, the auditors will probably find that the loan was not permitted and on the face of it, it was irregular to have lent the Board member money. Since it was indicated by the Chair of the Board that there is a dispute as to how Board members may be rewarded, it should be pointed out that emoluments per Board meeting are permitted. Such payments must, however, be budgeted for and the budget must be approved at the AGM or a Special General Meeting. Since payment of emoluments to Board members is a sensitive matter, the Board and station manager must ensure that such payments remain within the approved budget. Reasonable costs incurred to attend may also be paid.

[8] Since it is clear that no *audited* financial statements were filed and no AGM has been held for quite a time, these charges are upheld.

[9] In so far as sanction is concerned, it is clear that the management is in disarray and that the recommendation to Council should attempt to place the Board on a level where the strife must end and the dysfunctional station should be placed on its feet again, so that it may comply with the ICASA Act and the conditions of its license. Of course, we cannot change the attitude of Board members and their relationship with the station manager. That is a matter which they must clear up as soon as possible. It is significant that the deposed Chair called upon the CCC not to revoke the license and stated that he was “a man of peace”. Much will depend on the Chair of the Board and him. They should bury the battle axe in the interest of the community. Proper policies should be agreed upon by the Board and the station manager must constantly be aware of the fact that although he is in charge of the day-to-day operations, he has to report to the Board, which is, ultimately, responsible for Radio Moretele. Further, it is imperative that the Board urgently make use of experts to advise them as to legal, personnel and financial affairs. If any further hearing takes place in this matter (see below), failure to obtain such advice will be taken into consideration as an aggravating circumstance. The same approach will be followed if the strife does not come to an end.

[10] The following recommendation is made to Council:

A. That a report be filed by the Chairperson of the Board to the Co-ordinator of the CCC by no later than 15 March 2009 containing the following:

1. The minutes of at least two meetings held by the Board and Station Manager before 15 January 2009 with a committee of at least 15 listeners so as to assist the Board and Management in the selection of programmes as intended in condition 8.1.
2. The Minutes of an AGM which is to be held on or before 28 February 2009 so as to inter alia elect a Board for a term of **two years** commencing on 1 March 2009.
3. A list of members present at the AGM, such list having been signed by each member present at the AGM, also stating his or her physical address.
4. A full list of registered members of Radio Moretele with their physical addresses.
5. A statement signed by the Chairperson of the Board and the Station Manager that:
 - (a) the time and venue of the AGM was advertised in broadcasts at least twice every day for 21 days before the AGM, one between 06:00 and 09:00 and the other between 18:00 and 20:00;

- (b) in the same broadcast, it was conveyed that only registered members would be able to vote at the AGM, registration to take place at the office of Radio Moretele from 10:00 to 16:00 during weekdays;
 - (c) registration as members would cease three days before the AGM (in other words, if the AGM were to take place on the 15th, the last registration would be permitted on the 11th);
 - (d) the broadcast announcing the AGM states that only registered members may vote and that registration would come to an end 3 days prior to the AGM.
[Further registration may only be permitted as from the day after the AGM]
6. An audio copy of the advertisement of the AGM with the details set out above is made available to the Co-ordinator of the CCC.

B. That *audited* financial statements of the two previous financial years (2006-7 and 2007-8) are submitted to the Co-ordinator of the CCC on or before 30 March 2009.

C. That if the Monitoring and Complaints Unit (MCU) of the Authority is not satisfied that the above order has been complied with, that the matter be reported to the CCC who will then hold an urgent hearing and consider recommending to Council that the license of Radio Moretele be revoked with immediate effect.

J. C. W. van Rooyen

2 September 2008

JCW van Rooyen SC

Mr. Justice De Villiers, Ms. Ntanjana, Ms Matshoba and Prof. Delport concurred with the above judgment.