

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date of hearing: 20 March 2008

Case number: 13 / 2008

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

**Complainant**

**vs**

**Islamic Unity Convention (“IUC”)**

**Respondent**

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## Complaints and Compliance Committee

E. K. Moloto- Stofile (Chairperson)  
S. Thakur  
N. Ntanjana  
D. Moalosi  
T. Matshoba  
J.C.W. Van Rooyen SC

### For the Complainant

Monitoring Complaints Unit Senior Manager for Licensing:

Mr. Bruce Mkhize

Assisted by: Monitoring Complaints Unit Manager:

Ms. Fikile Hlongwane

and Compliance officer responsible for Radio 786:

Ms. Lindisa Mabulu

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### For the Respondent

A. Schippers SC instructed by L.A. Adams & Associates, Wynberg

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*Community broadcasting license – subject to the condition that the licensee set up a separate legal entity which would control the broadcasting service – condition cannot in law be implemented. Only the licensee may broadcast and it may not be placed under a duty to transfer the license.*

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<sup>1</sup> In terms of s 17C of the ICASA Act 13 of 2000 as amended

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## JUDGMENT

### JCW van Rooyen

[1] The Islamic Unity Convention (“IUC”) was granted a four year license to operate a community radio station on 1 August 2002 by the, now defunct, Independent Broadcasting Authority (“IBA”). The IBA’s functions have been taken over by the Independent Communications Authority of South Africa (“ICASA”) in terms of the ICASA Act, 2000. The IUC, is charged for not having set up a separate non-profit legal entity in terms of its license conditions. The radio station, Radio 786, forms part of the Islamic Unity Convention. The Constitution of the IUC, however, grants the radio station independence in its editorial policy.

[2] The IUC raised the following points *in limine*: that the CCC was being requested to enforce invalid special licence conditions imposed by the IBA and that such conditions were not authorised by legislation; should the CCC find that the special conditions are valid, the IUC would lead evidence that the IBA had imposed the conditions for an ulterior purpose and that the conditions were, for that reason, invalid. The Constitution of the IUC, in any case, grants the radio station independence in its editorial policy.

[3] According to the special conditions, in contrast to the general conditions of its licence, the IUC shall set up a separate legal entity charged with the ownership and control of the broadcasting service. The licensee shall lodge the founding documents and details of the board and management of the new entity within six months of the granting of the licence with the IBA. Mr *Schippers*, for the Respondent, argued that the special condition is in conflict with the tenor of the IBA Act. The Act holds the licensee responsible for the duties under the Act and the licensee is the IUC. Various duties are placed on the “licensee” and it simply does not make sense to then expect the licensee to set up a separate legal entity, which is in no way denoted as the licensee and does not have the duties of the licensee. The licensee is clearly stated to be the IUC but, in conflict with that, it has to hand ownership and control of the broadcasting service to a separate legal entity, which is not the licensee. It was,

accordingly, contended that the special condition was in conflict with the general conditions of the licence and the IBA Act and should be regarded as *pro non scripto*. On the other hand Mr *Mkhize*, for the Complainant, argued that each condition of a licence should be given effect to. What is more, the IUC had, in negotiations with the Complainant, undertaken to set up such an entity. Licence condition 1.1 in fact pointed towards the licensee abiding by its promises, intentions and undertakings.

[4] According to section 1 of the Independent Broadcasting Authority Act 1993, as amended, a community broadcasting service is a broadcasting service “which (1) is fully controlled by a non-profit entity and carried on for non-profitable purposes; (2) serves a particular community; (3) encourages members of the community served by it or persons associated with or promoting the interest of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting; and (4) may be funded by donations, grants, sponsorships or advertising or membership fees, or any combination of the aforementioned.” The identical definition is repeated in section 1 of the Electronic Communications Act 2005.

[5] The IBA deemed it fit to require from the licensee to set up a separate legal entity “charged with the ownership and control of the broadcasting service”. The motivation was that since the IUC is a national body, there would be no guarantee that it would pay special attention to the affairs of the community that Radio 786 would serve. The IUC stated that it would establish a committee which would formalise mechanisms to ensure accountability by the committee to listeners. Nevertheless, the IBA required the Islamic Unity Convention to set up a separate *legal entity* as set out above. Why *this* additional step was necessary is not fully explained by the IBA in the reasons for granting the licence, as handed up at the hearing.

[6] On the issue whether or not the CCC has the power to entertain questions on the validity of special licence conditions and whether the IBA used its powers to prescribe licence conditions in a lawful manner, the CCC has no power to challenge or overturn a decision of the IBA or ICASA. However, the CCC will seek to attach a legal interpretation to the special licence conditions.

[7] On the issue whether the structure of the IUC is a corporate entity, there is authority in our law that it is possible for a voluntary association to be a corporate entity. Whether this is so, will depend on its Constitution and, only if the Constitution is not clear, will evidence of extraneous facts be permitted. 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. From a perusal of the Constitution of the Islamic Unity Convention, it is clear that it is a common law legal persona. It has permanence in spite of its members' possible withdrawal or alteration and has the authority to own property and other rights. It also does not pursue gain for its members and need not, accordingly, be registered as a company in terms of section 30(1) of the Companies Act 1973. See *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) (1999 (8) BCLR 845): where Olivier JA states as follows:

“[8] The prohibition contained in s 30(1) should be kept within its proper bounds. The underlying purpose of the prohibition in our country, as in England, is to prevent mischief arising from trading undertakings being carried out by large fluctuating bodies so that persons dealing with them do not know with whom they are contracting (see *Smith v Anderson* (1880) 15 ChD 247 (CA) at 273; *Mitchell's Plain Town Centre Merchants Association v McLeod and Another* 1996 (4) SA 159 (A) at 169I - 170B). On the facts before us it cannot be said that Save was trading or carrying on a business with the object of the acquisition of gain. Consequently, the objection cannot be upheld.”

[8] Instead of setting up a separate legal entity, the IUC proposed to set up a special committee to protect the rights of the listeners within the special interest group. It is assumed that the IBA was not satisfied with this suggestion and required a separate legal entity to be set up. If the motivation was – as was the policy of the IBA and ICASA at that stage ( see *Radio Pretoria v Chairperson ICASA & Others* 2003(5) SA 451(T)) - that the community would elect the Board of the entity, it should be pointed out that this approach has been rejected by the Supreme Court of Appeal in 2007, when it held that the prescription of the IBA and ICASA, according to which a *community* would be entitled to elect a board of a section 21 company, without being members of the company, is in conflict the Companies Act 1973. See *Radio Pretoria v The Chairperson of ICASA and Another* (SCA Case no 296/06). The same principle would apply to a common law legal persona: its members would elect its board, unless provided otherwise in its Constitution.

[9] The special condition which required the setting up of a separate legal entity which would be “charged with the ownership and control of the broadcasting service”, is silent as to the future of the broadcasting licence. To argue that the surrounding circumstances would indicate that the licence should also be transferred, is not permissible. The general rule is that evidence of surrounding circumstances in order to interpret a statute is not permissible. The same rule should apply to the determination of rights and duties in a licence. In respect of a statute Steyn JA said the following in *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA and Another* 1958 (4) SA 572 (A) at 657H--658A:

To the extent to which the interpretation of a statute should be based upon surrounding circumstances requiring evidential proof, it would be an interpretation which could operate *inter partes* only. If the leading of evidence were to be admissible, no other person when affected by the statute, could be denied the right to bring other evidence proving other surrounding circumstances or disproving those accepted in a previous case; and in every case the evidence, unless the parties are in agreement as to its effect, would have to be led anew. The result would be that the interpretation of the same provision in an enactment may for good reason differ from case to case. The uncertainty and confusion which would arise from that, needs no elaboration. I consider, therefore, that generally speaking such evidential proof would not be admissible.

An exception to this general rule would be where reference is made to the report of a judicial commission of enquiry, the investigations of which shortly preceded the passing of the statute, but then only in order to ascertain the mischief aimed at by the statutory enactment in question See *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 669D.

Also see *S v Makwanyane and Another* 1995(3) SA 391 (CC) at 405H where Chaskalson P (as he then was) said:

[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process.

[19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case.

[10] Clause 1.1.1 states that the licence is granted to the IUC “with due regard to the representations made by the licensee with regard to its nature, control, and management as well as the promises, intentions, and undertakings given or made on its behalf.” No definite meaning can be attached to the reference to representations, promises, intentions and undertakings. Licence conditions are public documents and should be understandable to all concerned. How would a third party, who was not part of the procedure before the IBA, ever

know what these promises etc were? If there were promises, such promises should be included in the licence conditions explicitly – see section 9(7) of the ECA.

[11] Even if one were to assume that such promises etc were relevant, there is no evidence that a promise was ever made by the IUC that it would set up a separate legal entity. Time and again it was stated by the Executive that the matter would be considered by the National Council of the IUC and that the Executive had no power to set up such a legal entity.

[12] To set up a legal entity which is charged with the ownership and control of the broadcasting service makes no sense in law without including the obligation to also transfer the licence to such an entity. However, all that the IUC would have to do would be to copy the IBA or, now, ICASA, with the founding documents and there is no stated obligation to also transfer the licence. It could be argued that it is implicit in the condition that the license should also be transferred. Yet, the general conditions clearly identify the IUC (“to broadcast as Radio 786”) as the licensee and a large number of obligations are placed on it for a term of four years. The only inference which can reasonably be drawn is that the IBA determined the licensee to be the IUC, but that the broadcasting would take place by an independent legal entity. This is not permitted by law. Only a licensee may broadcast while the separate legal entity would not have a license. The special condition cannot, accordingly, be implemented in law. No contravention of the special licence conditions took place.

[13] In practice, it should be pointed out that the IUC, itself, is a non-profit legal entity and that if it were not to abide by the general conditions it should be charged with such a contravention. In this respect, we especially refer to the attention which should be given to the needs of the community which it serves. There is no evidence that the IUC is not abiding by these obligations and it is, in any case, not part of the charge. In practice the IUC would seem to have a very close connection to Radio 786. This, *inter alia*, appears from a line of court cases instituted or defended by the IUC in regard to the rights of Radio 786, e.g. *Islamic Unity Convention v The IBA and Others 2002(4) SA 294(CC)*; *SA Jewish Board v Sutherland NO and Others 2004(4) SA 368(W)* and *Islamic Unity Convention v Minister of Communications [2007] ZACC 26* and its attendance to the present charge.

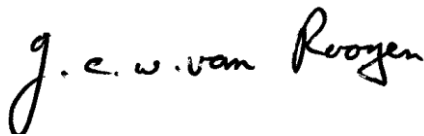
[14] In principle there is no prohibition against an entity such as the IUC to conduct a community broadcasting service. It is a non-profit common law legal entity and, accordingly,

complies with the requirement in the IBA and the ECA Acts that a community broadcasting service must be a non-profit legal entity. The IUC is based on religious governance and within the fundamental right of freedom of religion, the right to set up such a legal entity, which even has an interest in broadcasting, is undoubtedly permissible. The dilution of such an organization by eliminating the broadcasting wing from it amounts to unreasonably interfering with that freedom. As long as the IUC ensures, by way of e.g. a special committee, that the community interests are served, it is acting within the realm of freedom expression with due recognition of rights of its listener community, which are also protected by the Constitution and the ECA.

**In the result the complaints are dismissed.**

**16 April 2008**

*The Chairperson, E Moloto-Stofile and Committee Members D.Moalosi, S.Thakur N. Ntanjana and T.Matshoba concurred in the above judgment.*



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**JCW van Rooyen**

**For: CHAIRPERSON OF THE CCC**