

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 25 July 2007

Case number 8 / 2007

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

Complainant

Vs

Radio Kaboesna

Respondent

SUMMARY

Radio Kaboesna, a community radio station conceded that it had not complied with its license condition that it must contract Sentech as their signal distributor. Defense that it does not have the funds to pay Sentech is not good in law. The CCC thus finds the station to have contravened its licensing conditions.

The following sanction is recommended to Council:

- (1) that the Respondent be granted 90 calendar days to comply with the condition as from the date on which the order is issued by the Authority;
- (2) that if there is no compliance after the said 90 days, the Respondent must desist from broadcasting until such time as it complies with the condition;
- (3) that a fine of R20 000 be imposed for the breach of the condition, such fine being suspended for a period of two years subject to the condition that the Respondent is not found by the CCC to have breached the same condition.

¹ Established in terms of s 17C of the ICASA Act 13 of 2000 as amended. Referred to as the CCC in this judgment.

JUDGMENT

JCW VAN ROOYEN SC

[1] The Monitoring and Compliance Unit of the Independent Communications Authority of South Africa filed a complaint with the Complaints and Compliance Committee that the Respondent (a community broadcasting station licensed by the Authority) has not, and is still not complying with the license condition that it must broadcast with Sentech as its signal distributor. In stead, it has been carrying out its own signal distribution.

[2] The Respondent has conceded that this is the case and has argued in mitigation that it simply does not have the funds to remit Sentech fees.

[3] Whilst the CCC has understanding for the predicament of a community broadcaster with the ideal of reaching 30 000 listeners, and at the same time not having the necessary funds to accomplish this ideal, it is nevertheless of paramount importance that such broadcaster should not attempt to distribute its own signal which has not been authorized by the Authority in its license conditions. The intention of the license condition is clear: signal distribution may only be undertaken by organisations licensed to do so. The Respondent does not have such a license and could be charged in terms of section 17 H(3)(b) before a Criminal Court. This does not fall within the jurisdiction of the CCC. What does fall within the CCC's jurisdiction is the non-compliance with the condition to contract Sentech as its signal distributor.

[4] Absence of funds amounts to a plea of impossibility of performance. The ambit of a successful plea of impossibility is a limited one. It cannot simply be based on the absence of funds. The Respondent is not compelled by law to broadcast. It was its own decision to apply for a broadcasting license. If it does not have the funds to provide the service, then it is the predicament of its own making.² Necessity would also not be a defense in this

² See Snyman *Criminal Law*(2002) 62.

instance. Although the station could be called upon to broadcast emergency messages during disaster situations, its primary mission is that of entertainment and information to its listeners in the coverage area, and as such, the 'importance' of listener coverage cannot be put at a higher level than the protection of radio frequency spectrum.³

It is of great importance that radio frequency spectrum be controlled and protected at all times by qualified operators of transmission equipment so as to prevent possible harmful interference to other users of electronic apparatuses. Necessity was, in any case, not put forward as a defense.

The complaint is, accordingly, upheld.

[5] As to sanction, it should be accentuated that respect for control of the frequency spectrum is paramount. The Respondent has, as it were, taken the law into its own hands and continued broadcasting in contravention of its license condition. The absence of funds is, to a certain extent, mitigating, but ultimately the omission to give effect to this important license condition poses a serious risk to the sustainability of the radio spectrum.

The CCC recommends to Council:

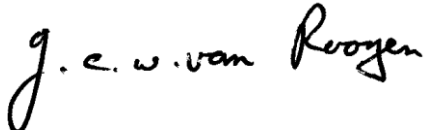
(1) that the Respondent be granted 90 calendar days to comply with the condition as from the date on which the order is issued by the Authority;

(2) that if there is no compliance after the said 90 days, the Respondent must desist from broadcasting until such time as it complies with the condition. It should be pointed out that if this order to desist is not abided by, an offence will be committed by the Respondent in terms of section 17H(1)(f) of the ICASA Act 13 of 2000 as amended. It should also be noted that on conviction the Court may order the Respondent to pay a fine not exceeding R1 000 000 or to imprisonment not exceeding five years. According to the principles of criminal law, the directors may also be charged with the Respondent.

³ *S v Adams* 1981(1) SA 187(A); I agree with the criticism lodged by Snyman (ibid) as to the facts of the particular case. However, the principle enunciated is, as a general principle, a sound one.

(3) that a fine of R20 000 be imposed for the breach of the condition, such fine being suspended for a period of two years subject to the condition that the Respondent is not found by the CCC to have again breached the same condition.

The Chairperson, Ms. Moloto-Stofile, and Committee Members, R.Mokwena-Msiza, N.Ntanjana, D.Moalosi and S.Thakur concurred.



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JCW van Rooyen

For: CHAIRPERSON OF THE CCC

14 August 2007