

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

Date of hearing: 24 April 2008

Case number: 18 / 2008

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

**Complainant**

**Vs.**

**Voice of Tembisa**

**Respondent**

---

## **Complaints and Compliance Committee**

E. K. Moloto- Stofile: (Chairperson)  
S. Thakur: (CCC Member)  
N. Ntanjana: (CCC Member)  
T. Matshoba: (CCC Member)  
J.C.W. Van Rooyen SC: (Councillor)

### **For the Complainant**

Monitoring Complaints Unit:

Ms.Lindisa Mabulu

Assisted by: Compliance Officer:

Paseka Maleka

---

### **For the Respondent**

Chairperson of the Board of the Voice of Tembisa:

Mr. Sonnyboy Masingi

Board member responsible for programming:

Mr. Manase Malinga

Station manager for Voice of Tembisa:

Mr. Saubrey Tshabala

---

### **The Matter**

*Community radio station – non-compliance with conditions of license concerning filing of audited financial statements, programme schedule and recordings.*

---

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

*Community Radio station – only members permitted to vote– listeners not having any legal interest in running of station, unless they are members of section 21 company or the other legal entity which owns the station.*

*Monitoring officer – duty of – not including education of management of station.*

*Procedure – splitting of charges not permissible*

## **Judgment**

### **JCW van Rooyen**

[1] Tembisa Community Radio Station is charged for not having submitted its audited financial statements for 2006-7, not reacting to a request from the Complainant that it must submit a programme schedule of the station, failing to submit on request of the Complainant recordings for the period 15-20 January 2008, failing to submit monthly programme log sheets, failing to submit a list of management personnel, failing to submit a complaints report and, lastly, that it failed to submit proof of community participation by way of formal structures which would facilitate community participation in the control, management, operational and programming aspects of the broadcasting service.

[2] The Respondent, through its Chairman, admitted that the station had, except in one case, not complied with the above mentioned conditions of its licence. In so far as community participation was concerned, regular contact was made with the community, although not by way of formal structures.

[3] The Chairperson of the Respondent explained that the present Board had only been elected in July 2007. They found the administration to have been in a very poor condition and have mandated a firm of auditors to do a forensic audit on the books of the station. This report has not yet been received. They have also now ensured that the administration functions properly. Errors made were not deliberate and due to lack of knowledge of what was expected from the station. The Chairperson complained that the monitoring officer had not taken the trouble to educate them as to the Electronic Communications Act and the ICASA Act and that he was partly to blame for their non-compliance. Despite invitations to attend their meetings, he had not turned up. In fact, the relations between the station and the officer were not good at all.

[4] The station has not produced audited financial statements (“financials”) for the financial years ended 28 February 2007 and 29 February 2008. The station argues that their failure to produce their financials is due to the fact that the affairs of the station were not being run properly during the tenure of the previous board of directors (“the previous board”). The current board of directors (“the current board”) has appointed forensic auditors who are currently in progress with a forensic audit to ascertain the status of the station’s financial affairs.

[5] In terms of the International Standards on Auditing (“ISA”), the purpose of a statutory audit is to express an opinion on the fair presentation of the financial statements, while a forensic audit is, an agreed upon procedure or a factual finding engagement, performed according a specific mandate. It can therefore be deduced that an audit can, and should be performed on any financial account regardless of whether the board requires any investigation to be performed on the financial affairs of the station, even though the chances of the audit opinion amounting to a disclaimer, or otherwise qualified, are high.

[6] The current board also states that there is a person who has been responsible for the preparation of the station’s financial accounts. In our opinion, if the accounts for the year ended 28 February 2007 have been prepared, the current board should have the financials audited, regardless of whether the forensic audit has been completed or not. The auditor will then express an independent opinion on whether these statements are a fair presentation of the station’s financial position, financial performance and its cash flow for the year then ended.

[7] Our view is that the station should not withhold a statutory audit merely based on the presumption that once the forensic audit is completed and the current board corrects the wrong doing of the previous board, the auditors will be able to issue an unqualified audit opinion. The auditors may not qualify the audit opinion due to the mismanagement of the previous board, but may qualify for another reason, therefore the argument by the current board that they are attempting to clean up the station’s financial situation prior to issuing the financials does not hold water. In addition, it is highly likely that the auditors will issue a qualified audit opinion during the first financial year of audit, merely based on the fact that the financials have not been audited for the financial years ended 28 February 2007 and 29 February 2008.

[8] Statutory audits and forensic audits serve different purposes. A statutory audit is done in terms of the International Standards on Auditing and is done only to express an opinion on the fair presentation of financial statements. A statutory audit is not designed to investigate fraud, even though there are procedures performed that could detect fraud where there is no collusion or serious effort to conceal the fraud. A statutory audit is based on historical information; therefore the results of the forensic audit would have no effect on the opinion of the statutory auditors.

[9] There is no doubt that the Respondent has not complied with the conditions as set out above. Mere informal contact with the community as to programming is not sufficient. Formal structures must be set up and minutes should be held of the meetings. It should, however, be pointed out that in so far as condition 8.1 requires the station to also include participation by the community in the *management* and *operational* aspects of the station, such participation is not permitted by way of these structures. The Board of the legal entity, whether it be a section 21 company or a common law legal entity (see *MCU v Radio 786*, case 13/2007), is in control of the station. The Board is appointed by members of the section 21 company or of the common law legal entity. The community cannot, simply because it is the listener community, take part in management and control. To take part in the management a listener must be a member, who is formally on the member list of the legal entity. The Supreme Court of Appeal (see *Radio Pretoria v The Chairperson of ICASA and Another* SCA Case no 296/06) has held that only *members* of the legal entity may vote at its General Meetings. The Board would also only have to report to the General Meeting – whether it is the Annual General Meeting or a Special General Meeting. Any perception according to which a community of listeners has a legal interest in the management and control of a station is unfounded in law. Only members of the legal entity who have complied with the formal requirements for membership and who have been approved by a General Meeting (or another structure indicated by its Constitution) to be members, may vote. It should, however, be pointed out that if the procedure according to which membership is permitted is unduly restrictive, the Authority will require such procedure to be amended when considering the application or a renewal of the licence. On the other hand, it would be impermissible to open membership to pressure groups which, for ulterior motives, attempt to gain entry to the legal entity. An application for membership must, accordingly, be *bona fide*.

[10] It should be pointed out that in so far as the charge sheet in (c) refers to the inability of the Complainant to determine whether the station has complied with other conditions as a result of its failure to provide the complainant with recordings, such inability should not be regarded as part of the charge. Such inclusion would amount to a splitting of charges, which is impermissible in criminal law and in administrative disciplinary inquiries. The first charge is sufficient: it delineates the omission. The consequences of the omission would be relevant in determining the seriousness of the omission, but should not be added as separate charges. The reference to the consequences is, accordingly, struck from the charge sheet.

[11] As to sanction it is relevant that the new Board has taken steps to address the apparent poor management. In favour of the Respondent it is accepted that it finds itself in a “business unusual” position, as it was called by the Chairperson. Nevertheless, swift and efficient reaction is now necessary and matters must be rectified.

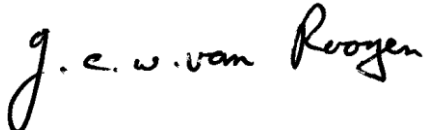
The following recommendation will be sent to Council, unless the station is able to show within seven days after this judgment reaches the management, that the sanction is not reasonable:

“Voice of Tembisa is ordered to file with the coordinator of the CCC and the Monitoring Unit of ICASA”;

- (1) its audited financial statements for the period 2006-7 within ninety calendar days from this Council resolution;
- (2) its programming schedule before the end of August 2008 for the months of June and July 2008 combined with a log that these programmes were broadcast and, if not, the reason for such amendment or omission;
- (3) a list of its management personnel (stating their positions) as at 1 June 2008;
- (4) a written report of complaints, if any, received for the period 1 July 2008 – 31 December 2008;
- (5) the minutes and members of at least one committee of at least 10 persons, which it has formed from the community of listeners for participation in the choice of programmes before 1 December 2008.
- (6) to pay a fine of R10 000 if paragraph (1) of this order is not complied with and a fine of R2000 each for the omission to give effect to any one of paragraphs (2), (3), (4)

and (5) and the CCC has found this to have been the case after due inquiry and on complaint by the Monitoring Unit of ICASA.”

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



.....

**JCW van Rooyen**

**For: CHAIRPERSON OF THE CCC**