# COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date heard: 4 October 2019 CASE NR: 354/2019

In the matter

**REFERRED BY the CCA OF ICASA**

Concerning

**iGAGASI FM** Respondent

TRIBUNAL: Prof JCW van Rooyen SC (Chairperson)
Councillor Nomonde Gongxeka-Seopa
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Mr Jack Tlokana

Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Meera Lalla.

## JUDGMENT

**JCW van Rooyen**

[1]The allegation before the CCC, as filed by the Complaints and Compliance Division of ICASA in terms of section 17B of the ICASA Act, is that the Respondent radio station, which is licensed by ICASA and broadcasts from Durban has, during the General Election period 2019, contravened the Regulations on Party Election

[1] The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments: are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Once Council has decided, the final judgment is issued by the Complaints and Compliance Committee's Coordinator.

Broadcasts and Political Advertisements. It failed, as required by the Regulations, to clearly identify before and after a party election broadcast that what was to be broadcast and what had been broadcast amounted to a Party Political Advertisement.

**BACKGROUND**

(2)The CCA submits that Radio iGagasi contravened the Regulations on Party Election Broadcasts and Political Advertisements (PA) ("the Election Regulations").

Regulation 6(12) of the Election Regulations provides as follows:

> *"a broadcasting service licensee that broadcasts a Political Advertisement must ensure that all PA's broadcast are:*
>
> *(a) Clearly identified through a top and tail disclaimer; and*
> *(b) Are announced in a similar manner."*

**SUMMARY OF THE COMPLAINT**

[3] During the election's coverage monitoring exercise, the Elections Broadcasting Monitoring team of the CCA, observed that on the dates and times as follows below:

(a) 01 April 2019 at 07:31:37;
(b) 22 April 2019 at 08:42:42 and 14:45:08;
(c) 23 April 2019 at 10h42 and at 15h27; and
(d) 27 April 2019 at 08:26:36 and 12:01:03

iGagasi FM broadcast the Democratic Alliance (DA) political advert without the top and tail disclaimers, in contravention of the Election Regulations 16(2):

On 17 July 2019, the CCA advised iGagasi FM of the alleged contravention.

[4] **RELIEF SOUGHT**

The CCA sought the following relief: An appropriate penalty as prescribed by section 17E (2)(b) and (e ) of the ICASA Act. It should be mentioned that the maximum fine for a contravention of any of the said Regulations

is stated in the Regulations to be R1million. The Regulations are attached to this judgment.

[5] **RESPONSE TO COMPLAINT**

**Background**

Contravention of Regulation 6(12) of the National and Provincial Party Elections Broadcast and Political Advertisements Regulations, 2014, as amended

(1) Our Senior Traffic manager was on annual leave when these moments took place. Her stand-in out of having little supervision made a mistake and loaded these without disclaimers and since her supervisor was absent, these unfortunately fell through;

(2) Besides the days on the report, we managed to stick to the rules and regulations by airing audio that had top and tail which shows that we did not purposely aim to contravene the Elections Regulations;

(3) The person who was responsible for contravening the regulations was also trained and made aware of procedures and why these needed to be done, hence the mistakes ended in April and did not continue thereafter;

(4) Political advertising is of vital importance to iGagasi FM as a commercial licensee and we derive commercial benefit from being a sought after advertiser for political parties. Attached is a report on all political adverts flighted by iGagasi FM in 2019. Out of 164 generic adverts flighted, only 7 spots were flighted without a disclaimer.

(5) The reason for the abovementioned is to try and illustrate to the Authority that this type of mistake is simply unacceptable for any commercial licensee, and thus we take such an occurrence with the utmost seriousness. At the time of this matter coming to our attention I, as the Managing Director of iGagasi FM, was travelling on business and thus I requested my second in charge to respond to the email. Upon my return I did conduct a further investigation with a view to instituting disciplinary action against the Junior Traffic Controller, in addition to corrective measures. However, the person responsible had resigned by this time and thus no disciplinary action could be taken against her. To

exacerbate this matter at the time, the line manager of reference for the role responsible for Traffic Control had resigned a month earlier and we had not filled the vacancy.

(6) With that said, Gagasi FM takes full responsibility for this unfortunate error. As a result we have taken further steps to ensure this will not happen again, as follows:

(a) Although the leave taken by our Senior Traffic Officer (who has over 20 years' experience) was taken as a result of unforeseen circumstances, iGagasi will no longer approve annual leave for the Traffic staff during the election period.

(b) In our advertisement to fill the vacancy left by the Junior Traffic Controller one of the core competencies we have listed is 3 years' experience in a similar role in Traffic control.

(c) Our Senior Traffic Officer will be doing minuted internal workshops, as we do with our News team, with our Traffic staff preceding all future election periods to ensure all staff are aware of the regulations and the seriousness thereof. These workshops will be overseen by the line manager of reference and signed off by the Managing Director.

(7) On behalf of Gagasi FM, I would like to offer my sincerest apology to the Authority for this unfortunate error.

**FINDING BY THE CCC**

[7]Party Political advertisements are permitted during an election period as an exception to the general rule that radio and television must be party political neutral. Party political advertisements must, however, be broadcast in such a manner that the neutrality of a radio station remains in place. Special steps must, accordingly, be taken, as per the Regulations, to uphold this principle.

Except in very exceptional cases, the Legislature (which is ICASA for purposes of these Regulations) would explicitly or by implication expect the Courts and a Tribunal such as the CCC, to not make a finding against a broadcaster where intention to contravene a regulation or negligence is absent. What thus remains to be decided is whether the contravention by *iGagasi* of the Regulation was culpable. It has often been stated by the CCC that the mere fact that an omission to abide by legislation or a licence condition in terms of legislation is *legally*

attributable to a licensee, is dependent on whether it had intentionally or negligently not abided by such legislation.[2] There might be instances in legislation where negligence or intention to contravene are not even required – so-called absolute responsibility. However, the approach of the CCC in regard to relevant legislation has been that intention or negligence is required before a contravention is found. Of course, there may be such instances in future cases, but we have not come across such instances in the 12 years of the CCC's existence.

[7] The matter of ownership and control of a licence is a matter of public interest, as understood in the legal sense of the word.[3] To only hold licensees who have acted with intention (which includes the foresight of unlawfulness, so-called *dolo malo* conduct) responsible would go against the clear legislative intention to prohibit party political advertisements to be broadcast without due warning that the broadcaster is not putting forward its own view. Negligence would thus also be sufficient for a finding to be made against a licensee. There could, of course, be cases of serious negligence (so-called *culpa lata*) which would lead to an increase in the fine imposed. On the other hand there are also cases of lighter negligence (so- called *culpa levis).* There is no ground to find that the omission by *iGagasi* was intentional. The question is, however, whether the licensee was negligent and whether it could possibly even have amounted to a case of *gross* negligence, which would increase the fine. Guidance can be sought from statements of the law by Judges and also at common law.

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[2] According to the Supreme Court, there are some cases where a conviction may be made without *culpa* or *dolus* (= negligence or intention)

[3] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): "(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . .(2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest..." Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others 1998(4) SA 1196(SCA) at 1212* where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht (9th Ed vol III at 224 para 238:* Translated :"In practice the public interest is especially employed in matters concerning views expressed via die printed media and television: public interest is, within this context, based on freedom of expression, as guaranteed by the Constitution and by treaties, to expose alleged abuse (and or evil in society).In deciding whether the defence of public interest was lawful usually depends on a balancing of interests – the outcome of which is dependent on the facts of each case.

[8] The legal question is what a reasonable licensee would have done in the same circumstances. In *Re Castell-Castell* 1970 (4) SA 19 (R) Goldin J stated as follows:

The meaning of 'serious negligence' has been considered in a number of reported cases. (See *Bertholdi v Central South African Railways*, 1910 T.P.D. 141 at pp. 143-5; *van Breda, N.O v Victoria Falls & Transvaal Power Co. Ltd.,* 1916 AD 325 at pp. 336, 352, 353; *Johnson v Marshall, Sons & Co. Ltd.,* 1906 A.C. 409 at pp. 411-2, 414 and 414-7; *Van der Heever v Perry,* 1926 S.R. 78). The correct approach, in my view, is to determine in the first place whether the conduct of the appellant constituted or involved negligence, and, if that is found to be the position, it then becomes necessary to decide whether his negligence can be described as 'serious' negligence. In deciding whether the appellant was negligent on the facts of this case, it is necessary to determine whether he was guilty of

'an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent man would not do'….

The appellant was aware of the fact that he should ascertain whether it was safe to pick up the snake and applied his mind to this problem. As I have mentioned before, he examined the snake, he observed the injuries it sustained, that it was motionless, and he placed the butt of his rifle upon the snake's head and it did not display any signs of life. As a person who had handled snakes over a long period of time and was aware of their habits and behaviour, he came to the conclusion that it was safe to pick up the snake.

I am of the view that appellant was guilty, as the ultimate consequences prove, of an error of judgment. It must be borne in mind that the Appeal Board held that it was his duty 'to clear the snake from the road'. There is no evidence, however, to support the conclusion of the Appeal Board

'that he must have known or should have known that if he picked up the snake by the tail there was a risk that it would have bitten him'.

Appellant's evidence, as to how and why he arrived at his decision to pick up the snake and that he was experienced in performing such a task, is not in dispute. There is no evidence concerning what other steps or precautions a reasonable man should or would have taken in these circumstances.

Goldin J stated as follows in *In Re Castell v Castell* 1970(4) SA 22:

The question really is whether he acted in a reasonable and prudent manner in determining whether it was safe to pick up the snake, and on the undisputed facts before me I am of the view that there is no justification for finding that his disability was caused by his negligence. As events turned out, he was guilty of an error of judgment, but that an error of judgment may not amount to negligence is recognized in *Steenkamp v Steyn*, 1944 AD 536 at p. 553, where the CHIEF JUSTICE said:

'Plaintiff misjudged the situation, and that was an error of judgment, but unless such error of judgment was culpable, in the sense that a reasonably careful driver would not have been guilty of it, it was not negligence.'

(See also Rex v Du Toit, 1947 (3) SA 141 (AD) at p. 146).

In my view, appellant's error of judgment on the undisputed facts was such as a reasonably careful person might commit. It is not unusual for reasonable persons or experts to be guilty of an error of judgment which does not amount to negligence. It is obviously necessary to avoid being wise after the event by determining the culpability of a person on the basis of the known consequences of his conduct.

[9] In *Stella Tingas, MV: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2003 (2) SA 473 (SCA) Scott JA stated as follows in regard to what gross negligence means:

[7] I shall assume, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143C ) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl's* case supra at 557A - E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (Van Zyl's case supra at 559D - H). It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. The Roman notion of *culpa lata* included both extreme negligence and what today we would call recklessness in the narrow sense or *dolus eventualis*. (See Thomas *Textbook of Roman Law* at 250.) As to the former, with which we are presently concerned, Ulpian's definition, D50.16.213.2, is helpful: 'culpa lata is extreme negligence, that is not to realise what everyone realises' (*culpa lata est nimia neglegentia, id est non intellegere quod omnes intellegunt*). Commenting on this definition, Lee in *The Elements of Roman Law* 4th ed at 288 describes gross negligence as being 'a degree of negligence which indicates a complete obtuseness of mind and conduct'.

Buckland in *A Textbook of Roman Law* 3rd ed at 556 suggests that what is contemplated is a 'failure to show any reasonable care'. Dicta in modern judgments, although sometimes more appropriate in respect of *dolus* eventualis, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); 'a total disregard of duty' (*Rosenthal v Marks* 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (*S v Smith en Andere* 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D). It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the in fact reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

[10] That a serious mistake was made by trusting a stand-in to manage election promotions is clearly negligent. It is true that the employee entrusted with this task had, for family reasons, to take leave and that another person had to be placed in her position. The management should, however, have made a more effective arrangement, as was, in fact conceded at the hearing of this matter. In fact, the CCC is of the view that the standard for gross negligence was met as defined by the Courts – despite our full understanding for human error. The control over election broadcasts is an important duty and to have left it to an untrained stand-in to keep the necessary controls in place, amounts to not even closely having complied with what should have been done. The criterion set for gross negligence as set out in the *Stella* matter quoted above was met.

[11]The management was clearly grossly negligent. When an important advertisement must meet a standard set in a regulation it is simply not reasonable to leave an inexperienced stand-in in charge. The management of a radio station has an important task. A community obtains the right and unique privilege, according to South African Law, to be entrusted with the use of public property: a part of the airwaves. The licence and the Regulations which govern the licensee, are made by a Regulator which is entrusted to regulate the airwaves by section 192 of the Constitution of the Republic of South Africa. Its task is an onerous one: to ensure a balanced use of the airwaves, which was

ignored by pre-Constitutional apartheid laws and policy. The licensee is, however, also entrusted with being a Keeper of the Constitution for the airwaves issued to it by ICASA. Airwaves in essence belong to the public and are regulated in their interest by the State. ICASA represents the State and, in the present matter, to protect broadcasters and ensure clarity of information to the public. The present matter goes even deeper: the right of a listener, who may vote for any Party of her or his choice, is at stake. The Regulation is clear and was also, especially, as a 2019 innovation, brought to the notice of licensees who took part in information ses1ions of ICASA.

## FINDING

**RADIO iGAGASI IS FOUND TO HAVE CONTRAVENED REGULATION 12(6) of the REGULATIONS ON PARTY ELECTION BROADCASTS, POLITICAL ADVERTISEMENTS AND THE EQUITABLE TREATMENT OF POLITICAL PARTIES BY BROADCASTING LICENSEES AND RELATED MATTERS SEVEN TIMES. ALSO THAT IT HAD BEEN GROSSLY NEGLIGENT IN THESE OMISSIONS:**

## ADVICE TO COUNCIL AS TO AN ORDER

**The Regulations prescribe a maximum penalty of R1 million.[4] Obviously that would apply only to extreme cases of non-compliance – for example intentional contraventions of a gross nature. The advice is as follows:**

1. Firstly iGgasi must for five **consecutive** weekdays broadcast an apology as set out hereunder in English and isiZulu as a first item in a newscast between 07:00 and 21:10.The first and second newscasts – which must be between 07:00 and 07:30 must have it as a first item.

2. Secondly a fine of R50 000 is imposed, R20 000 of which is suspended until after the next general municipal election – the condition being that if iGagasi, during any election period in that period contravenes the same Regulation again, as found by the CCC, the R20 000 will become payable within the term set by Council at that stage *PLUS* the order which is imposed for the matter which has *then* been before the CCC and Council.

**3. The present order, as advised to Council, thus reads as follows:**

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[44] See the Regulations as attached to this judgment.

(a)iGagasi must during the first week after this order is issued broadcast in isiZulu and English once per day for five consecutive days as its **first** item on its **news** service the following statement at a time between 07:00 and 20:10 – in isiZulu and then in English in the same News Bulletin. On the first two days the broadcast must take place in the first newscast after 07:00.The times of the broadcasts must be notified by email to the CCA of ICASA at the latest 48 hours before such broadcast. The broadcast may not be accompanied by any background music or sounds and the item must be read formally by the **Station Manager or her or his representative, who must declare on air that she or he is the Station Manager or acting on behalf of the station manager:**

*The Independent Communications Authority of South Africa has found that this station was grossly negligent in not having abided by the General Election Regulations 2019 on seven occasions. We broadcast seven party election broadcasts without adding before and after the advertisement that this was a Party political advertisement. This is in conflict with the ICASA Election Regulations, which requires such statements to be made before and after the advertisement. Radio iGagasi extends its apology to its listeners and ICASA for these contraventions.*

**The same statement must be broadcast in isiZulu immediately before the English statement in the newscasts.**

An electronic copy of each broadcast, stating the time and date of broadcast, must be sent to the CCA at ICASA by e-mail within 48 hours from the last broadcast in the said five days.

(b)Secondly, a fine of R50 000, of which R20 000 is suspended until after the next General Municipal Election, must be paid to ICASA within ninety calendar days from when this judgment is issued. The latter amount is thus: R30 000.

The CEO of ICASA or his nominee are requested to provide the radio station with the bank details of ICASA and the CEO or his nominee must be copied with proof of payment within 24 hours from when the payment was made.

**JCW VAN ROOYEN SC** **25 October 2019**

**The Members Concurred**