

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 5 August 2016

CASE NUMBER 198 /2016

IN RE: JOZI FM RADIO

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jacob Medupe
Mr Jack Tlokana
Ms Mapato Ramokgopa

From JOZI FM: Mr Mpho Mhlongo (CEO) with Board Members

From Broadcasting Compliance: Ms Fikile Hlongwane (Manager) with Mr Tom Tleane from Legal

Acting Coordinator: Ms Meera Lalla (Attorney)

JUDGMENT

JCW VAN ROOYEN SC

[1] Jozi FM is a licensed community broadcaster in terms of the Electronic Communications Act 2005 (“ECA”). Section 56 of the ECA provides as follows: “A party election broadcast and a political advertisement must not be broadcast

¹ An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors 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 sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council’s imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

on any broadcasting service except during an election period and then only if, and to the extent authorised by the provisions of sections 57 and 58.” The Broadcasting Compliance Unit at ICASA referred the following alleged contravention of section 56 read with section 58 of the ECA to the Complaints and Compliance Committee: that Jozi FM Radio had on 25 and 26 April 2016 broadcast four political advertisements of the Economic Freedom Fighters, a political party registered with the Electoral Commission. These broadcasts took place before the election period, which commenced, as proclaimed, on 23 May 2016.

[2] On 2 June the Broadcasting Compliance Unit informed the radio station of the four broadcasts and that the station had contravened section 56 read with section 58 of the ECA as well as regulation 6(1) of the Regulations on Municipal Elections Broadcasts – the latter essentially repeating section 56.

[3] Mr Mpho Mhlongo, CEO of the radio station, in an email to the Coordinator, conceded that the station had failed to comply. He added that this had “been the station’s first offence of such nature” and that “they have been doing an introspection on how they let this slip through.” He, however, asked for leniency as to sanction and stated that it was the station’s intention to ensure that such contravention does not repeat itself. This probably refers to the proposal by Broadcasting Compliance that the station be fined the amount paid by the relevant political party for the advertisements.

[4] In essence the defence of the radio station is that somehow these advertisements had “slipped through.”

[5] Section 58 of the ECA provides as follows:

Political advertising on broadcasting services

- (1) A broadcasting service licensee is not required to broadcast a **political advertisement**, but if he or she elects to do so, he or she must afford all other political parties, should they so request, a like opportunity.
- (2) **A broadcasting service licensee may broadcast a political advertisement only during an election period and then only if it has been submitted to such licensee on behalf of a political party by its duly authorised representative.**
- (3) In making advertising time available to political parties, no broadcasting service licensee may discriminate against any political party or make or give any preference to any political party or subject any political party to any prejudice.

- (4) A political advertisement may not contain any material which may reasonably be anticipated to expose the broadcasting service licensee to legal liability if such material were to be broadcast.
- (5) A political advertisement must conform to a technical quality acceptable to the Authority.
- (6) **No political advertisement may be broadcast later than 48 hours prior to the commencement of the polling period.**
- (7) This section is subject to the provisions of any law relating to the expenditure of political parties during an election period. (emphasis added)

A political advertisement is defined as follows in section 1 of the ECA:

“political advertisement” means an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party, for which advertisement the relevant broadcasting service licensee has received or is to receive, directly or indirectly, any money or other consideration;

“election period” is defined as follows in the ECA:

“election period” means the period commencing with the date on which the election day is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected;

- [6] The date of the election was proclaimed by the Minister of Cooperative Governance and Traditional Affairs, Mr D van Rooyen, on 23 May 2016 after he had signed the notice on 22 May 2016 in terms of the Local Government: Municipal Structures Act 1998. According to the ECA and the regulations it is clear that political advertisements may only have been broadcast as from 23 May – the date of the Proclamation in the Government Gazette. A broadcaster – even a community broadcaster with its usually lower income - should at least obtain legal advice as to the effect of the ECA and the Local Government: Municipal Structures Act 1998 on municipal elections. It is a most important restriction since votes could be influenced unduly by an unlawful advertisement. A high standard of compliance is, accordingly, expected from a licensee. In *S v Waglines Pty Ltd and Another*² Judge Didcott held that “ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he*

² 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

is engaged in a trade, occupation or activity which he knows to be legally regulated.” To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice. Compare *S v Longdistance Natal Pty Ltd*³ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*⁴ in the form of *culpa*⁵ is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

- [7] We have no doubt that not only an intentional violation of section 56 read with section 58 of the ECA (and also the regulation which repeats section 56) could lead to a finding against the broadcaster. As appears from the above dictum in the *Longdistance* matter, negligence would also suffice for a finding against a broadcaster. And, it is our view that given the importance of sections 56 and 58 of the ECA, that negligence would also suffice for finding against a radio station. A reasonable broadcaster, in the position of Jozi FM, should at least have known or obtained legal advice as to its duties in terms of the applicable legislation. Even if Jozi FM knew about section 56 or the relevant regulation, it had made an error in its planning, which was also negligent. ICASA took steps to inform licensees of the Regulations: ICASA workshops were organised and representatives of Jozi FM were present at one of these workshops, according to the register, which was attached to the documentation before the CCC. Jozi FM argued that it had been misled by the April pronouncement of the date of the election by the President. It brought it under the impression that this announcement had initiated the election period.

³ 1990 (2) SA 277 (A).

⁴ Translated: “a guilty mind”.

⁵ Translated: negligence.

FINDING ON THE MERITS OF THE CHARGE

- [8] The conclusion is that Jozi FM has contravened section 56 read with section 58 of the ECA four times by broadcasting political advertisements before 23 May 2016. The station was negligent in not abiding by section 56 and 58 of the ECA: thus, even if it knew about section 56 and 58 (which seems so from its defence) an organisational error, based on a misunderstanding, had been made.

THE ORDER PROPOSED TO COUNCIL

- [9] As to sanction the usual possibilities⁶ as set out in section 17E(2) would apply. These possibilities must be read with section 4(3)(p) of the ICASA Act which (as amended from 2 June 2014) provides as follows:

(p) except where section 74(1) of the Electronic Communications Act applies, (the Authority) must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

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- ⁶ (2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -
- (a) direct the licensee to desist from any further contravention;
 - (b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;
 - (c) direct the licensee to take such remedial or other steps[not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;
 - (d) where the licensee has repeatedly been found guilty of material violations -
 - (i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance committee, subject to the proviso that a broadcasting or communications service, as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or
 - (ii) amend or revoke his or her licence; and
 - (e) direct the licensee to comply with any settlement.

Section 56 of the ECA is, indeed, an instance where no penalty is prescribed. The CCC, in its advice on sanction to Council believes that a fine would be appropriate in this instance. It is true that the radio station has a clean record within the sphere⁷ of elections and has pleaded for leniency. Having regard to section 17H of the ICASA Act, a wide variety of *maximum* fines are prescribed, ranging from R5 million, R1million to R500 000.

Of course, these fines pertain to criminal law and, when one considers the offences set out in section 17H of the ICASA Act, prescribed for particularly serious criminal offences, it would be unfair to simply regard these amounts as directly applicable to regulatory contraventions, as in the present matter. Yet, section 4(3)(p) of the ECA read with section 17E(2)(b) of the ICASA Act authorises the CCC to propose fines and does, at least, allow the CCC to consider a *fine* – which would, otherwise (without section 4(3)(p)) have been legally impermissible. Of course, the present contraventions also deal with a serious matter, but given the fact that these contraventions (considered as a group) amount to a first contravention within this sphere and were not committed with knowledge of unlawfulness, it would seem fair to impose one fine for all the contraventions as a group. We have also considered the station’s latest financial statement (which is quite positive and shows good management), the fact that Ms Hlongwane informed us that the station has often been referred to as an exemplary radio station to other radio stations by the Compliance Unit and the sincere apology from the Board. These are all extenuating circumstances when it comes to the determination of the quantum of a fine.

It is proposed that Council issue the following order:

1. A fine of R2000 is imposed and must be paid to ICASA within 30 days from the date that this judgment is issued by the Council of ICASA.
2. Additionally, the station must broadcast **twice** on its news service the following statement at a time between 07:00 and 21:00 within seven days of being notified by ICASA of this judgment as its **first item** – such time being notified by email to the Coordinator of the CCC 24 hours before the broadcast:

Inhlangano elawula ezokuxhuma eNingizimu Africa, phecelezi ICASA, ikhiphe isinqumo esigweba lesisiteshi ngokuthi asizange sihambisane nemithetho

⁷ It has a finding against it in *Monitoring and Complaints Unit v Jozi FM* (Case 12/2007) – but that complaint fell within a different sphere of the Code – fair comment, and was indeed nine years ago, since when it has had a clean record.

elawula ukubika ngokhetho. Iphutha lethu kwaba ukusakaza imibiko eqhakamisa amaqembu epolitiki (phecelezi amapolitical adverts) emine ngaphambi kwesikhathi esinqunyiwe ngoba unqongqoshe wayengakalikhphi ngokomthetho usuku lokhetho. Siyaxolisa kakhulu kubalaleli bethu Kanye ne ICASA ngalamaphutha.

["The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Rules. We broadcast four political advertisements before the election was announced by the Minister of Cooperative Governance and Traditional Affairs. This station extends its sincere apology to its listeners and ICASA for these contraventions."]

A copy of the broadcast must be sent to the Coordinator of the Complaints and Compliance Committee by electronic mail within 48 hours from the said broadcast.



JCW VAN ROOYEN SC

10 August 2016

Chairperson

The Members agreed with the finding and the order proposed to Council