COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 18/11/2021 **CASE NO: 427/2021**

KAGISO MEDIA (PTY) LTD **COMPLAINANT**

V

CLASSIC FM SA (PTY) LTD **RESPONDENT**

AND

DATE OF HEARING: 19/11/2021 **CASE NO: 423/2021**

PRIMEDIA (PTY) LTD **COMPLAINANT**

V

CLASSIC FM SA (PTY) LTD **RESPONDENT**

CCC MEMBERS:
Judge Thokozile Masipa - Chairperson
Ms. Yolisa Kedama - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Xola Mantshintshi - CCC Assessor
Thamsanqa Mtolo - CCC Assessor
Amukelani Vukeya - CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

For the Complainant

- Ms Ayanda Ngcobo (1st matter)
- Mr Steven Budlender SC (2nd matter)

For the Respondent

- Ms Margareta Engelbrecht SC (both matters)

JUDGMENT

Judge Thokozile Masipa

INTRODUCTION

[1] This matter concerns two separate but related complaints lodged by two different Complainants, Kagiso Media (Pty) Ltd and Primedia (Pty) Ltd against the Respondent, Classic South Africa (Pty) Ltd. The CCC heard the first matter, Kagiso v Classic on 18 November 2021 while the second matter, Primedia v Classic, was heard on 19 November 2021.

[2] The parties in these matters are commercial sound broadcasting licensees. The allegations of non-compliance the Complainants brought against Classic were exactly the same. In both matters the facts as well as the issues to be determined were identical. Not surprisingly, submissions by counsel inevitably overlapped. For convenience, therefore, it became necessary to combine the two proceedings and reduce them into one judgment.

[3] Facts were largely common cause. The issues to be determined, therefore, remained the interpretation of the applicable law.

SUMMARY OF THE COMPLAINT

[4] The first complaint is that Classic unilaterally and unlawfully changed the name of its station, from Classic FM 1027 to Hot FM 1027 without following the prescribed procedure. Classic denied the allegations.

[5] The Complainants alleged that before changing the name of the station, Classic ought to have made an application to ICASA to amend its licence in terms of section 10 of the Electronic Communications Act ("ECA") read with Regulation 9 of the Licensing Processes and Procedures for Individual Licences, 2010.

[6] The allegation in the second complaint was that Classic failed to comply with its format obligations in terms of clause 5.1 of its amended licence.

[7] It was common cause that the format obligations concerned, provide that Classic shall play 50% Classical Music and 50% Old Skool and R&B Music. Also common cause was that Classic currently plays Old Skool and R&B Music between 5h00 and 23h00 and Classical Music between 19h00 and 5h00. While Classic averred that it was in compliance with the format obligations, the Complainants contended that this is not so. Before going into detail, it is necessary to briefly discuss the precursor to the current state of affairs.

HISTORICAL BACKGROUND

[8] Until recently Classic FM was well known as a commercial classical music radio station. It is now home to Old Skool and R&B Music. Circumstances which led to the present state of affairs and to present complaints are set out hereunder:

[9] In April 2020 Classic FM South Africa (Pty) Ltd ("Classic") applied to ICASA for an amendment to its individual sound broadcasting licence. Among other things, it specifically sought to amend the format obligations in clause 5.1 of its licence from playing 100% Classical Music to playing Old Skool and R&B

Music among other genres. In essence, the application for an amendment sought to do away with Classical Music altogether.

[10] The move above was precipitated by inevitable changes in the music industry. Due to changes in musical consumption trends over the years, Classic FM faced major financial challenges. This was as a result of a decline in listeners and a dip in advertising revenue.

[11] To avert the hardship, in October 2019, Classic was placed in business rescue. Two months later it was taken out of business rescue when the business rescue practitioner accepted an offer by a consortium of investors to purchase approximately 81% of the shares.

[12] In April 2020 Classic made two applications to ICASA. The first application was to transfer control of the licence to the new shareholders. The second application was to amend the format obligations from Classical Music to an Old Skool and R&B Music. It is the second application that is relevant to these proceedings.

[13] It is apparent that Classic sought to appeal to a commercially popular format as listeners showed a diminishing interest in Classical Music. It stated, amongst others, that the audience most likely to be interested in a classical format could access the music in other ways such as online, for instance.

[14] ICASA considered the application and, on 30 April 2021, issued an amended licence to Classic. Clause 5.1 of the amended licence read that the format obligations *"shall be 50% Classical Music and 50% Old Skool and R&B Music".*

[15] On or about June or July 2021, various media reports announced that Classic was in the process of rebranding itself. Of significance, was that Classic FM 1027 would soon be called Hot FM 1027. Classic would also change its format obligations from playing predominantly Classical Music to becoming a home for Old Skool and R&B Music. It was this that triggered the present complaints.

[16] I now proceed to deal with each complaint in turn.

CHANGE OF THE NAME OF THE STATION

[17] It is common cause that Classic FM recently changed its name from Classic FM 1027 to Hot FM 1027. The Complainants alleged that this was done unlawfully as the prescribed procedure was not followed.

As a result, Classic FM had contravened the following legislation:

17.1 Schedule 1 of Classic FM's licence which provides that the name of the station is Classic FM 102.7.

17.2 Clause 11(3) of Schedule 1 to the Regulations regarding Standard Terms and Conditions for Individual Licences as amended provides that the station must clearly identify itself at intervals of not more than 30 minutes.

17.3 Section 5(12) of the Electronic Communications Act No 36 of 2005 ("ECA), provides that a licence confers on the holder the privileges and subjects him or her to the obligations provided for in this Act and specified in the licence.

17.4 Section 10 of the ECA provides for an amendment of an individual licence. It states that the Authority may amend an individual licence after consultation with the licensee.

[18] Classic denied any wrongdoing stating that it had no obligation to apply for an amendment of its licence in order to change the name of the station. Classic stated that it gave ICASA the required "notification" in terms of Regulation 14A of the Standard Terms Regulations. It received no response from ICASA while a follow up in this regard yielded no results.

[19] The Complainants submitted that an application for an amendment of a licence was a pre-requisite for a change of name of the station. The basis of

this submission was that the name of the radio station was an express term of an individual sound broadcasting licence while it was also distinct from the name of the entity that holds the licence "the licensee"). For this submission, the Complainants placed reliance on clause 1 Schedule 1 which states that the name of the station is Classic FM 1027. The details of the licensee in clause 1 are provided separately and are different.

[20] Counsel for the Complainants argued further that the clause relating to the "Name of Station" is not merely a clause setting out information. It is tied to express and specific obligations borne by Classic under the statutory framework. In particular, Clause 11(3) of the Standard Terms and Conditions for Individual Broadcasting Services ("Standard Terms Regulations") imposed an express requirement on a radio station to identify itself. It provides in particular, that *"A station must clearly identify itself at intervals of not more than 30 minutes"*

[21] Section 5(12) of the Electronic Communications Act ("ECA") provides that *"[a] licence confers on the holder the privileges and subjects him or her to the obligations provided for in this Act as specified in the licence".*
Put differently, the conditions contained in licences create statutory obligations for licensees.

[22] Taken together, section 5(12) of the ECA and clause 11(3) of the Standard Terms Regulations oblige Classic FM 1027 to identify itself in accordance with its station name, that is, as Classic FM 1027. The fact that Classic FM identifies itself as Hot FM 1027 is a breach of these provisions as Hot FM 1027 is not the station's name, the Complainants argued.

[23] Classic denied any wrongdoing stating that it was under no obligation to apply to amend its licence when it sought to change the name of the station. It was satisfied that it had given ICASA the required "notification" in terms of Regulation 14A of the Standard Terms Regulations, and that was sufficient.

THE LEGAL FRAMEWORK

[24] The procedure by which any term of a licence may be amended is clearly prescribed in the ECA and the Individual Licensing Processes and Procedures Regulations ("the Processes Regulations"). In terms of section 10(2) read with section 9(2) to (6) of the ECA:

24.1 an applicant for an amendment must apply to ICASA in the prescribed form;

24.2 ICASA must give notice of the amendment application in the Government Gazette, and allow interested parties an opportunity to make representations;

24.3 ICASA must consider the application and the representations, make a decision in respect of the application, notify the applicant of the decisions and reasons, and publish such information in the Government Gazette.

[25] The reasons for such an elaborate procedure are clear. In an environment where ICASA has an obligation to regulate in the public interest it makes sense that transparency should be given prominence and that the process should involve and encourage public participation whenever terms and/or conditions of a licence are to be amended.

[26] It is ICASA's prerogative to amend a broadcaster's licence. It follows, therefore, that the licensee has no right to unilaterally change the name of the station as that change is effectively an amendment of the licence. There can be no licence without a radio station. And a radio station cannot broadcast without a licence. It was common cause that no application for an amendment of a licence to change the station name was made to ICASA.

[27] Classic submitted that an application to amend a licence for the purpose of changing the name of the station was not a requirement as a company could

trade in any name it chose and that station names were merely trading names chosen by licensees.

[28] According to Classic, the only requirement when changing the name of the radio station, was a "notification" in terms of Regulation 14A of the Processes Regulations. Regulation 14A(2)(a) provides that

"a licensee must submit a notice of change of information where the name or contact details of the licensee changes."

[29] A fatal flaw in Classic's argument was its failure to recognize the distinction between the name of the station and that of the licensee. I say this because Classic seemed to be conflating the notion of a station and a licensee when they are in fact separate concepts as can be seen in the ECA, the Standard Terms Regulations and the licence.

[30] That a station name cannot merely be a trading name without any legal obligations is obvious from clause 11(3) of the Standard Terms Regulations which states that a radio station ***"must identify itself at intervals of not more than 30 minutes".***

[31] A station is a completely separate entity from a licensee as can be illustrated by a licensee such as the SABC which operates a number of radio stations, for example Metro FM, SAFM and others. Each of these stations is obliged to clearly identify itself on air by its name at intervals of not more than 30 minutes. Should SABC decide to change its name, changing that name would require it to "notify" ICASA. However, changing the name of Metro FM, or any of its other stations, for instance, would require the licensee to make an application to ICASA for an amendment to the licence.

[32] Regulation 14A of the Processes Regulations refers specifically to the "licensee".

It lists three specific details where mere "notification" to ICASA is sufficient. It is necessary to set these out if full.

"14(A) Notice of change of information in respect of an individual licence

(1) A notice of change of information in a licence must be submitted in the format as set out in Form O.

(2) A licensee must submit the notice within seven (7) days of the change occurring where:

(a) name or contact details of the licensee changes; or
(b) nature of the service/s provided in terms of the licence change; or
(c) shareholding "

[33] From the above it can be seen that the rest, that is, licence terms and conditions fall outside Regulation 14(A) and must, therefore, be amended in accordance with the procedure prescribed in section 10(2) read with 9(2) to (6) of the ECA.

[34] The limited scope of Regulation 14(A) is further illustrated in the manner in which FORM O ("the notice") is structured. It is headed

"NOTICE OF CHANGE OF INFORMATION IN RESPECT OF AN INDIVIDUAL LICENCE"

(Regulation 14A)
The notice has several paragraphs to be completed by the licensee. Paragraph 1 relates to "Particulars of Licence" and requires the licence and a copy of the licence.
The most relevant paragraph for purposes of this judgment is Paragraph 2 which is set out hereunder in full.

1. ***CHANGE TO INFORMATION PROVIDED IN THE REGISTER***

2.1 Indicate whether the updated information relates to:

2.1.1 Name and contact details of the licensee (my emphasis)

and/or

2.1.2 Nature of the service provided by the licensee".

[35] It is significant that paragraph 2.1.1 refers specifically to a licensee and not a station. In fact, there is no reference at all to the name of the station. This shows without a doubt that the name of the station, unlike the name of the licensee, cannot be changed by merely completing a form and notifying ICASA of the change.

[36] There is a good reason for this distinction. ICASA has an obligation to regulate the ICT industry in the public interest. It makes sense, therefore, that the process of changing the name of the station should be a process that affords the public, (which includes the listeners, as well as other interested parties), an opportunity to participate in matters that affect them and to protect their interests if need be.

[37] On the other hand, it's unlikely that a listener would have an interest in the licensee or the fact that the licensee has changed its name or shareholding. It is not surprising, therefore, that the process of changing the name of the licensee should require a different process which is dealt with by CIPC.

[38] From a purely pragmatic perspective it also makes sense that a licensee is allowed to change its name and thereafter "notify" ICASA of such changes. After all, ICASA does not interfere in the internal affairs of the licensee. As stated earlier, change of name of the licensee is the business of CIPC not of ICASA. So, all that is needed by ICASA, in such a case, is notification of the change.

[39] Classic argued that the ECA does not expressly require an application to amend a station name. That may be so. However, it seems to me that the ECA and the Regulations do not expressly require the amendment of specific terms and conditions found in licences because there is a general obligation

to comply with the terms and conditions of the licence and to follow the prescribed procedure to amend those terms and conditions. (See section 5(12) of the ECA).

[40] There is yet another reason why the argument by Classic is indefensible and it is this:
Clause 1 of the Schedule to Classic FM's licence describes its station name as "Classic 102.7". That clause has never been amended. So when the station identifies itself on air as Hot FM 1027 it is a breach of the ECA, the applicable Regulations and the licence since that is not its name.

[41] Only ICASA has the authority to approve or reject an application to amend a licence after having considered all the relevant facts from the applicant and from the public. If Classic FM's argument is correct there would be no opportunity for interested or affected parties to make representations. That could never have been contemplated by the Legislature as it would be inconsistent with ICASA's obligation to regulate in the public interest.

[42] Instead of approaching ICASA with an application to amend its licence, Classic chose to amend the name of the station unilaterally which is not permissible. I would uphold the complaint. I next turn to the second complaint.

THE ALLEGED CONTRAVENTION OF FORMAT OBLIGATIONS

[43] As stated earlier, in the amended licence, clause 5.1 reads that "*Classic FM's format obligations shall be 50% Classical Music and 50% Old Skool and R&B Music"*. The Complainants stated that Classic was not compliant with this obligation and that it was actually playing 22.8% Classical Music and 78.2% Old Skool and R&B Music instead of the required 50/50. Classic denied this allegation.

[44] It was common cause that currently Classic FM plays Old Skool and R&B Music from 5h00 to 23h00 and plays Classical Music between 19h00 and 5h00.

[45] In denying the non-compliance with Clause 5.1, of the Schedule, Classic pointed out that ICASA granted it a discretion to decide when to play Classic Music on one hand and when to play Old Skool and R&B Music on the other as long as there was a 50/50 split.

[46] The fundamental question became whether the 50/50 split was to be measured on the basis of 24 hours as Classic contended or whether the correct measurement was in accordance with the performance period (that is the hours between 05h00 and 23h00) as argued by the Complainants. Whether or not Classic breached its obligations would depend on what measurement the CCC decided to adopt.

[47] The proper approach to interpretation is well established**. Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (CC) ("Endumeni")** emphasized the importance of reading the language of the provision or document in context, having regard to the purpose of the provision and the background to the preparation and production of the document. (See para [18]).

[48] This approach was confirmed in the **University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC)** paragraph 65 which was of the view that interpretation is a unitary exercise in which text, context and purpose of the relevant document are considered simultaneously and together without the one predominating over the other. Moreover, the context is to be determined with reference to *"the material known to those responsible for the production"* of the relevant instrument or document (see Endumeni para [18]).

[49] Clause 5 to the Schedule of Classic's licence provides that *"The Licensee shall provide 50% Classical Music and 50% Old Skool and R&B Music"*. It is, however, silent on the period over which that obligation is to be calculated.

Classic's contention was this was an indication that it was at liberty to choose the period over which it was to play the 50% of Classical Music. I disagree since the correct interpretation of Clause 5 to the Schedule indicates otherwise. When the text does not provide an answer, the next step is to look at the context within which the licence was issued. This would include, as the Complainants correctly submitted, ICASA's prevailing practice and the purpose of the format obligations in the licence.

Context and Purpose

[50] A close examination of both the context and the purpose of the format obligations supports the submission that the format obligation must be measured in accordance with the performance period. I say this for the following reasons:

50.1 Classic's licence expressly uses the performance period of 5h00 to 23h00 for measuring Classic's obligation to broadcast news for a minimum of 30 minutes each day.

50.2 The performance period in terms of which ICASA measures the compliance of licensees with their programme obligations is during the period of 5h00 and 23h00 and not on a 24-hour period as suggested by Classic. It follows, therefore, that where the amended licence requires Classic FM to play 50% Classical Music and 50% Old Skool and R&B Music this is measured over the 18-hour period of 5h00 to 23h00. These are the hours when most listeners would be awake.

50.3 In its reasons for the decision to amend Classic's licence to require it to broadcast 50% classical music and 50% Old Skool and R&B Music, ICASA demonstrated, *inter alia*, that the public interest was paramount.

At paragraph 13.2.5 it states the following

"In considering the amendment the Authority was of the view that… allowing for Classical Music to be provided on an online platform will prejudice its loyal

listeners across the racial and cultural spectrum who may not necessarily have means to tune in on the online platform but are depended on the traditional platform".

ICASA was further of the view that *"the regular and Classical Music listener despite the decline, **must not be isolated** but still catered for on the traditional platform".* (my emphasis).

[51] The above shows doubtlessly that ICASA wanted to ensure that Classical Music lovers were not jettisoned as Classic had initially sought to do. The Authority was also not persuaded that listeners of Classical Music would be accommodated on platforms other than the radio station that traditionally catered for them. The notion that the amended licence allows the licensee to relegate Classical Music to the dead of night, cannot, therefore, be correct as it is at odds with the reasons for the decision of ICASA when it considered the application for an amendment of its licence by Classic.

[52] It appears that ICASA was specifically concerned that listeners of Classical Music should not be "isolated", marginalized or left in the cold, as it were. It seems to me that by relegating Classical Music to the hours when most people have gone to bed, Classic is doing the very thing that ICASA wanted to avoid.

[53] I agree with the Complainants' submissions that having regard to the text, context and purpose of Clause 5 of Classic's licence, the obligation falls to be assessed over the performance period. The discussion above, strongly suggests that the period during which the two genres are played should be assessed over the performance period.

[54] Classic, however, remained adamant that the assessment should be done over a period of 24 hours as the term "the performance period" was used and could be used only in relation to the South African Music Content Regulations, 2016. ("Music Content Regulations").

[55] The South African Music Content Regulations, 2016, define the *"performance period" as "the period of 126 hours in one week measured between the hours of 5h00 and 23h00 each day."*

[56] Classic submitted that there was no basis to rely on the performance period outside the applicability of the SA Music Regulations. In any event*, "the so-called "Performance Period", does not find application to the facts of this case", it* was argued. Classic contended that the licence issued to it does not link the 50/50 requirement to the "performance period". This meant that the "performance period" could, therefore, not apply by operation of the law in the absence of such a requirement in the licence. This was because it was prescribed only in the ICASA Regulations on South African Music, and concerns the calculation of local content, it was submitted.

[57] I disagree. While these regulations do specifically apply only to the broadcasting of local content, they serve an important purpose of showing what ICASA's prevailing practice is. This practice has been consistent and there is no suggestion that there might be a reason to depart from it with regard to the format obligations of Classic in Clause 5.

[58] On the contrary, there is every reason to conclude that ICASA focuses on the hours when people are mainly awake and listening to the radio. The context and purpose of the amended format obligations indicate that ICASA takes the view that what is important is what happens during the performance period, which is during waking hours.

[59] The correct interpretation above leads to the conclusion that Classic has failed to comply with Clause 5 of its amended licence I would, therefore, uphold the complaint.

FINDING

[60] Accordingly, the CCC makes the following finding:

60.1 That Classic failed to comply with the ECA Act, the Regulations and the terms and conditions of its licence in that it changed the name of the station from Classic FM 1027 to Hot FM 1027 without following the prescribed procedures.

60.2 That Classic failed to comply with its format obligations in terms of clause 5.1 of its amended licence in that it played less than 50% of Classical Music and more than 50% of Old Skool and R&B Music during the performance period.

ORDER

[61] The CCC makes the following recommendations to be issued by ICASA

61.1 Direct Classic to desist from any further contravention of the Act, the Regulations and its licence terms and conditions, relating the change of the name of the station and the format obligations.

61.2 Direct Classic to take the following remedial step:

61.2.1 Within 7 days after ICASA has published its Findings, apply for a licence amendment to ICASA in the prescribed form with a view to changing the name of the station.

61.3 Direct Classic to pay a fine in the amount of R25000 of which R10000 would be payable immediatedly and the balance suspended for 24 months on condition that there is no repeated non compliance during the period of suspension.

TMMasipa

Judge Thokozile Masipa

CCC Chairperson