

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 21 September 2018

Case Number: 308 /2018

IN RE: KARABO FM

COMMITTEE: JCW van Rooyen SC (Chairperson)

Dr Keabetswe Modimoeng (ICASA Councillor)

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Mr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

Ms Busisiwe Mashigo: Manager(Broadcasting Compliance)

Appearing before the CCC: Three teams from the community

(1)Mr Tshepo Nthorela

(2) Bishop Sam Nkwanazi

(3) Mr Mathew Danasile

Acting Coordinator: Ms Meera Lalla (Attorney)

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

INTRODUCTION

Karabo FM, the radio station under inquiry in this matter, is a licensed

¹ An Independent Administrative Tribunal at the Independent Communications Authority of SA (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers the order 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. Decisions are subject to Review by the High Court.

community broadcaster in terms of section 50 of the Electronic Communications Act 2005("ECA"). Its licence was issued to it by the Independent Communications Authority of South Africa ("ICASA") on 14 June 2014. The licence period runs from 8 December 2013 to 7 December 2018. The licence permits it to broadcast in Sasolburg and surrounding areas in the Free State Province of the Republic of South Africa.

[2] This is the third time in 18 months that Karabo FM has appeared as Respondent before the Complaints and Compliance Committee ("CCC") at ICASA. In the previous two matters it was ordered by the Council of ICASA, on the advice of the CCC, to take certain rectifying steps.

[3] The present matter was referred to the CCC by Broadcasting Compliance at ICASA. At the heart of the matter lies the allegation that on two occasions the radio station has not been successful in giving effect to the substance of two orders by ICASA as recommended by the Complaints and Compliance Committee. The orders were issued by the Council of ICASA, following upon two matters which were brought before the CCC. One at the instance of Bishop Dr TS Ngcana, acting in terms of section 38 of the Constitution of the Republic of South Africa in the interest of a member (Bishop Sam Nkwanazi) of his congregation, who had been removed (unjustifiably, according to the finding of the CCC) from his post as Chair of the Board of the radio station. The second matter resulted from a reference by Broadcasting Compliance to the CCC – which related to allegations that the radio station had not given full effect to the previous order issued by ICASA on the recommendation of the CCC. The allegations were found to be justified and a rectifying order was issued by Council. Now, once again, there has, according to Broadcasting Compliance, not been compliance with the order of Council. In fact, Council, on the advice of the CCC, suspended broadcasting by the station for thirty days so that the station could give its full attention to abiding by the order of Council in regard to the election of a new Board. As appears from this judgment, a workable solution could not be found: two groups of the community having differed strongly on what the procedure should be in electing a new Board, in spite of clear directives issued by the Authority on the advice of the CCC. As a result Broadcasting Compliance filed the following document with the Coordinator of the CCC.

THE REFERENCE FROM BROADCASTING COMPLIANCE

1. PURPOSE

- 1.1 To advise the Complaints and Compliance Committee (CCC), that Karabo FM has failed to comply with the decision of the Authority as contemplated in section 17E of the ICASA Act no.13 of 2000.
- 1.2 That the matter be referred to the CCC for further adjudication.

2. BACKGROUND

- 2.1. On 24 April 2018, the Council of ICASA approved the recommendations of the CCC ruling dated, 13 April 2018. The Authority ordered Karabo FM to comply with the ruling, as follows: That an Annual or Special General Meeting for the election of a new Board be held on the last Saturday afternoon of June 2018 (30 June 2018) commencing not later than 17:00. Below is a chain of events on the said day.
 - a) Karabo FM failed to convene the meeting on 30 June 2018 due to reports of divisions within the community.
 - b) The Authority was advised that there were two factions within the Board following certain disagreements after an informal meeting that was held on 19 May 2018.
 - c) The Authority and CCC personnel who went to attend the AGM on 30 June 2018, were further advised that the other faction has its own list of members of Karabo FM, for the purpose of the same AGM.
 - d) In an attempt to reconcile the disputing parties and diffuse the volatile situation that had developed at the AGM, the CCC and CCA personnel requested the faction concerned, to produce another list with the aim of merging the two lists. Unfortunately, the people or faction concerned who claimed to have a separate membership list, did not produce any list.
- 2.2. The Authority further ordered that a statement be read by Karabo FM, every day as an item on the first news bulletin after 07h00, from 10 May 2018 until 30 May 2018. Further, that on alternative days commencing on 10 May 2018, that the same statement below, be read in Sesotho and the next day in English.

- 2.3. This statement must also be read in *both* languages as a last item before the station goes off air on 31 May 2018. Hereunder, is a statement to be read as follows: -

“ENGLISH

The Independent Communications Authority of South Africa has ordered the following:

- i. That Karabo FM’s licence to broadcast is suspended from 24h00 on Thursday, 31 May 2018 until 24h00 on Saturday, 30 June 2018.*
- ii. Thus, the Broadcasts by the station will be suspended for this period.*
- iii. The Authority has made this order so as to ensure that Karabo FM’s organisational and voting structure become aligned with its Constitution.*
- iv. All members of the Community served by Karabo FM, who are eighteen years or older, are called upon to renew their membership or apply for membership of Karabo FM on or before Friday, 22 June 2018 at the radio station during office hours.*
- v. A Karabo FM Special General Meeting will be held on Saturday afternoon 30 June 2018 commencing not later than 17h00.*
- vi. The Notice of the meeting must be given by the Secretary or Treasurer of the Board.*
- vii. The meeting will be chaired by the Deputy Chair of the Board or in his absence by the Secretary of the Board or in his or her absence by the Treasurer of the Board or in their absence by a person elected by the persons present at the meeting.*
- viii. Only registered members will be permitted to vote.*

SESOTHO

- (i) Hore lengolo la tumello ya kgaso ya Karabo FM le fangehilwe ho tloha ka hora ya 24h00 ka Labone la mohlal 31 Motsheanong 2018 ho fihlela ha nako e le 24h00 ka Moqebelo wa la mohlal 30 Phupjane*

2018.

- (ii) *Ka hoo, kgaso ho tswa seteisheneng sena e tla fangehwa nakong ena e beilweng.*
- (iii) *Lekgotla la Dikgokahanyo le entse pehelo ena e le ho etsa netefaletso ya hore sebopeho sa tsamaiso le sebopeho sa dikgetho tsa Karabo FM di tsamaiswe ho ya ka Molaotheo wa yona.*
- (iv) *Ditho tsohle tsa sechaba tse fumanang tshebeletso ho tswa Karabo FM, ba dilemo tse leshome le metso e robedi kapa tse ka hodimo, ba memelwa ho ntjhafatsa botho ba bona kapa ba kenye dikopo tsa botho ba Karabo FM ka la kapa pele ho Labohlano la 22 Phupjane 2018 seteisheng sa kgaso ka nako ya hora tsa tshebetso.*
- (v) *Kopano e ikgethileng ya Kakaretso etla tshwarwa ka Moqebelo mantsiboya a la mohlala 30 Phupjane 2018 yona e sa qale pele ho hora ya 15h00 hape e sa qale ka morao ho hora ya 16h00.*
- (vi) *Tsebisiso ya kopano e tlameha ho etswa ke Mongodi kapa Motshwaramatlotlo wa Lekgotla la Bookamedi.*
- (vii) *Kopano e tla ba botsamaising ba Motlatsa-Modulasetulo wa Lekgotla la Bookamedi kapa ha a le siyo tsamaiso e tla ba ya Mongodi wa Lekgotla la Bookamedi kapa ha a le siyo tsamaiso ebe ya Motshwaramatlotlo wa Lekgotla la Bookamedi kapa ha ba le siyo tsamaiso ebe ya motho ya tla kgethwa ke batho ba leng teng kopanong.*
- (viii) *Ke feela batho ba ingodiseditseng botho ba tla dumellwa ho kgetha.”*

2.4. The licensee failed to broadcast the statement in accordance with the Authority’s order and this resulted in confusion in the community. Some community members claimed they were not aware of the Authority’s order.

2.5. Further attempts were made by the Authority through the Regional Office in Bloemfontein, to have the judgment read out so as to alleviate any confusion and ensure the success of the AGM.

- 2.6. The Authority's order was also that a list of members be filed with the Consumer Complaints Affairs department of ICASA, on or before 16:00 22 June 2018.
- 2.7. The Secretary of the board furnished the Authority with the list on 22 June 2018. However, on the day of the AGM, another list emerged and resulted in confusion.
- 2.8. The Authority's order was further that the Secretary or Treasurer of Karabo FM call an informal meeting of the Community Forum on Saturday at 15h00, on 19 May 2018. The purpose of the meeting at the radio station premises was so as to, among others, discuss a strategy on how to ensure that the membership list should be compiled. That the Consumer Complaints Affairs Division ICASA must be invited to the same meeting.
- 2.9. An informal meeting was convened on 19 May 2018 with the Community as per the Authority's order. However, the meeting was disrupted after a Task Team was elected and agreed that the membership fee would be R50 instead of the existing R30

Annual General Meeting (AGM) of 30 June 2018

- 2.10. The meeting was disrupted, as indicated above because the Community was once again divided on the issue of membership, including the outgoing board. Lack of leadership in the board resulted in the hostile nature of the AGM.

Post AGM of 30 June 2018

- 2.11. The membership list under the leadership of the task team, as decided upon at the informal meeting of the 19th May 2018, resolved to convene another meeting on 21 July 2018 and elected a board of directors.
- 2.12. Subsequently, the Deputy Secretary of the outgoing board convened an AGM on 18 August 2018 and elected a board of directors.
- 2.13. The Licensee currently has two structures with multiple membership lists, each seemingly believing it is legitimate, which perpetuates the disunion

in the community. The situation is very volatile and has a propensity to explode even further, as these two structures are at loggerheads.

Relief Sought

Karabo FM has repeatedly failed to comply with the decisions of the Authority. This is the third material violation of its licence conditions brought before the CCC in a period of less than eighteen months and therefore, CCA will recommend as below.

2.14. That Karabo FM's licence be revoked in accordance with section 17E (2)(d)(ii) of the ICASA Act which provision states as follows: " *The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely—*

(d) where the licensee has repeatedly been found guilty of material violations—

(i); or

*(ii) amend or **revoke his or her licence; (own emphasis) and***

(e) direct the licensee to comply with any settlement."

2.15. Alternatively, for the CCC to decide on which governing structure of Karabo FM, should be deemed legitimate.

FINDING BY THE CCC

[4] The CCC has come to the conclusion that there is no realistic expectation that the two factions in the radio community, who appeared before us in this matter, would be willing to work together. They are clearly at loggerheads with each other in principle and in practice. The threats of disruption and violence have become a reality within this broadcasting community, served by Karabo FM. The

instigator of the violence is identified by Compliance. The CCC accepts the report of the Manager Broadcasting Compliance, which was not questioned by any of the parties who appeared before the CCC. It is not the CCC's task to determine where the fault lay. The facts speak for themselves. Facts which were not denied at the hearing of this matter – although, it should be added, the parties appearing before the CCC displayed the best of manners, as is to be expected before a Tribunal in a Constitutional democracy.

[5] Karabo FM would not seem to have taken the orders by the Authority seriously. This appears from the above report of Broadcasting Compliance as well as the CCC's previous judgment (Case 265/2017). After the order issued earlier this year by the Authority with clear directives, little was done to comply. Two Board Election Meetings were held by different groups. On the date which was planned for the AGM, threats of violence from one group led to the two ICASA officials having to be protected by the Police. Details are given in the Report by Broadcasting Compliance and we need not elaborate on that.

[6] When the matter was heard by the CCC, two members of the community, who had been elected at separate meetings as the Chair of Karabo FM, addressed the CCC. The one meeting which stood a chance of being regarded as valid, had required a higher fee to prove membership than had been required in the past. This was in conflict with the past approach as to membership fees and invalid. More than 130 members attended this meeting. It is true that the ideal was to compile a new membership list, but with that was not included the right to increase the membership fee. The other group, who had assembled on a later occasion, had not given notice to Broadcasting Compliance about their meeting and between 50 and 60 persons attended. No legal basis could be provided for this second meeting. For all purposes an election had been held and it served no purpose to call a second meeting.

[7] The problem is that the first meeting was also not a valid meeting. This is so since a higher membership fee of R50 fee was required and thereby the existing rate was ignored. This obviously led to a number of people not being permitted to vote.

[8]The two groups did not demonstrate any willingness at the hearing of this matter before the CCC to reconcile their differences.

[9] Given the history of the station over the past two years, which commenced with the irregular removing of Bishop Mkwanazi as Chairperson of Karabo FM, the CCC is of the view that there is no realistic expectation that the substantial differences in the Karabo community can, presently, be addressed amicably. As mentioned there was also no sign at the hearing that the two groups were prepared to do so. Broadcasting Compliance and the CCC Coordinator both attempted to bring the matter to an amicable conclusion. Two re-structuring orders of ICASA (the first and the second orders issued by the Council of ICASA) were not complied with and there is no realistic expectation or evidence, given the recent history during the period that the station was not on air, that the matter can be brought to a close amicably. For the CCC to choose between two invalid meetings is also not an option.

ADVICE TO COUNCIL AS TO AN ORDER

[10] The CCC is most aware of the important role which radio plays in the promotion of freedom of expression and the provision of information, unbiased news, sport reportage and entertainment. To close down a radio station will most definitely affect the right of the particular community to be informed and remain informed in terms of section 16 of the Constitution of the Republic of South Africa.

[11] However, given the level of strain between two top competing groups of potential Board members (as elected at two meetings) and the absence of any indication of settlement between them, it would be unrealistic to allow the radio station to continue to broadcast. In the light of the history of the station during the last 18 months, the likelihood is that strife would continue and this is likely to disrupt the service of the radio station.

[12] The CCC is of the considered view that given the present potentially disruptive situation, the radio station has no immediate future as a broadcaster. It also has a history of non-fulfillment of orders of ICASA. Furthermore, the absence of a clear initiative to agree to a Board – in spite of attempts by ICASA to provide a workable structure for the future - counts substantially against the future of this radio station.

PRESCRIBED PROCEDURE LEADING TO AN ORDER BY COUNCIL OF ICASA

[13The following procedure is prescribed by the ICASA Act in deciding on an order with which the CCC may advise Council as to an order:

17D. Findings by Complaints and Compliance Committee

- (1) The Complaints and Compliance Committee must make a *finding* within 90 days from the date of conclusion of a hearing contemplated in section 17B.
- (2) The Complaints and Compliance Committee must recommend to the Authority what *action* by the Authority should be taken against a licensee, if any.
- (3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of such proceedings to the Authority for a decision regarding the action to be taken by the Authority.

17E. Decision by Authority

- (1) When making a decision contemplated in section 17D, the **Authority** must take all relevant matters into account, including -
 - (a) the recommendations of the Complaints and Compliance Committee;
 - (b) the nature and gravity of the non-compliance;
 - (c) the consequences of the non-compliance;
 - (d) the circumstances under which the non-compliance occurred;
 - (e) the steps taken by the licensee to remedy the complaint; and
 - (f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.
- (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.

[14] The Council of ICASA has, earlier this year, suspended broadcasting by the station for a period of 30 days. This was done on the advice of the CCC, where it was regarded as imperative that the station substantially looks into its operational requirements from a community perspective. The intention was to grant management the opportunity to get its membership list in order and to hold an appropriately announced General Meeting to elect a new Board. As reported by the Manager Broadcasting Compliance, the attempts failed. Meetings were held, but substantial errors were made by the organisers.

[15] Broadcasting Compliance has argued that the CCC consider two options in the present matter: the CCC either advises Council to recognize one of the two elections of a Board to have been valid or, alternatively, advise Council to revoke the license.

[16] Broadcasting Compliance, in the document quoted above, from 2.4-2.13 has clearly shown that what was ordered by the ICASA Council was not complied with by the participants. It would make no sense for the CCC and thus the Council of ICASA, to choose one of the two “elected” Boards. The one, which came closest to the requirements of ICASA, unconstitutionally limited the voting to persons who had paid a R50 membership fee (in conflict with the lower fee

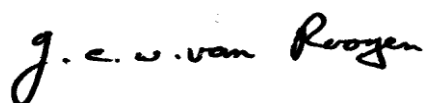
in the past).The matter of fees is, at least, a matter for the Radio station to decide upon at a General Meeting.

The meeting of the second group was clearly invalid. Given the fact that a Board had already been elected (although, as indicated above, invalidly so) it was not for the Deputy Secretary to call a second meeting about which Broadcasting Compliance was not even informed. For the time being a Board had been elected and it was not the task of the organizers of the second meeting to call a further meeting, since it was thought that the first meeting was not valid – or, in any case, for whatever reason. They were, as it were, taking the law into their own hands. The calling of that meeting and the meeting were clearly invalid.

[17] In the result there were, accordingly, two meetings which were not valid in law. One because of the higher fee charged for membership and the other because it did not fall within the directives issued by the Council of ICASA on the advice of the CCC.

[18] Given the apparently inimical relationship between at least two identifiable leadership groups, who held Board election meetings, the CCC has, with the full realization of the importance of a radio station for the community which it serves, decided that it has only one solution to the matter: to advise Council to revoke the license of Karabo FM with immediate effect.

In this regard it is advised that an arrangement be made with Sentech (and/or any other similar service provider, if it is providing a service to Karabo FM), that its service to Karabo FM cease simultaneously with the revocation notice to Karabo FM.



24 October 2018

JCW van Rooyen SC

The Members concurred with the judgment and the Advice to Council.

