

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

Date of Hearing: 17 August 2016

CASE NUMBER 204 /2016

IN RE: KASIE FM 97.1

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

From Kasie FM: Mr Jabu Mpembe (Station Manager)  
From Broadcasting Compliance: Ms Fikile Hlongwane (Manager) and with her  
Mr T Tleane from the Legal Division, ICASA  
Acting Coordinator: Ms Meera Lalla (Attorney)

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] Kasie FM 97.1 is a licensed community broadcaster in terms of the Electronic Communications Act 2005 (“ECA”). It broadcasts in isiZulu, Sesotho and English and was licensed by the Independent Communications Authority of South Africa

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<sup>1</sup> 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.

("ICASA") in 2008. The station was referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA since it had, allegedly in conflict with regulation 6(13) of the *Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters in Respect of Municipal Elections Broadcasting* (as amended), broadcast two political advertisements directly after each other on the 5<sup>th</sup> July 2016. A political advertisement is defined in section 1 of the Electronic Communications Act 2005("ECA") as follows:

**"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;

[2] In terms of section 56 of the ECA a political advertisement may only be broadcast during an election period. An "election period" is defined by the ECA as "the period commencing with the date on which the election is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected." Political advertisements may, in accordance with section 58(6) of the ECA, only be broadcast from the day on which an election is proclaimed up to 48 hours prior to the polling period commences – which, in this case, was at 07:00 on the 3<sup>rd</sup> of August 2016. The election on 3 August 2016 was proclaimed in the *Government Gazette* 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.

[3] There is no contravention of section 56 read with section 58. The question is, however, whether the above mentioned regulation 6(13) had been contravened negligently or intentionally.

[4] After having been informed of the alleged contravention by the Broadcasting Compliance Unit at ICASA, the licensee responded as follows:

"I have checked the contravention in regard to the political advertisement and it is sad that at Kasie we made a mistake on our side. We would like to apologize as it was not our intention to do so. (1) Having looked at the broadcast schedule for 5 July it is true that two political advertisements were broadcast one after the other. (2) The adverts were not scheduled within the same block. I guess our presenter faltered on the day."

A log was attached – which demonstrated that the presenter had conscientiously kept a record of each broadcast by marking each item off. It is, however, true that the advertisements were in different blocks, as stated by the station manager.

### **IS A FINDING AGAINST THE BROADCASTER JUSTIFIED?**

[5] There is no doubt that the advertisements of the ANC and DA were broadcast directly after each other. This was also conceded by Kasie FM. The ultimate question is, however, whether there was negligence on the side of the presenter. This is so since, even if there had objectively been a contravention of the said regulation, the question is whether the radio station had been negligent – which would be dependent on the question whether the presenter had been negligent as an employee. This legally *implied* requirement of negligence is discussed in the following paragraphs.

[6] The approach in such cases was described as follows in *S v Arenstein* 1964 (1) SA 361 (A) at 365C-D: The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (*R v H* 1944 AD 121 at 125, 126; *R v Wallendorf and Others* 1920 AD 383 at 394.) Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (*R v H* (supra at 126).)<sup>2</sup>

[7] Regulation 6(13) is, indeed, a statutory prohibition or injunction since a fine may be imposed. The question is whether there had, possibly, been an innocent violation of the regulation. If it had been innocent, then no finding may be made against the radio station.

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP*:<sup>3</sup>

[86] The general rule of our common law is that criminal liability does not attach if there is no fault or blameworthy state of mind. This is expressed by the maxim: *actus non facit reum nisi*

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<sup>2</sup> See further *S v Qumbella* 1966 (4) SA 356 (A) at 364D-G; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H-611A; *S v De Blom* 1977 (3) SA 513 (A) at 532B-D.

<sup>3</sup> 2014 (5) SA 317 (CC).

*mens sit rea* (an act is not unlawful unless there is a guilty mind). The fault element may take the form of either intention or negligence. This is true of both common law and statutory offences. (Footnotes omitted)

Also Justice Cameron (with whom four other Justices of the Constitutional Court concurred) stated as follows in *Democratic Alliance v African National Congress*:

[154] a further issue needs to be addressed. This also follows from the ground rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted 'false information'. This means that, in law, the author acted innocently. And the requirement of a guilty mind 'is not an incidental aspect of our law relating to crime and punishment, it lies at its heart'. *Strict criminal liability is therefore not easily countenanced. There is thus an interpretative presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are 'clear and convincing indications to the contrary.'*<sup>4</sup> (Emphasis added and footnotes omitted)

[8] There are also several judgments of the Supreme Court of Appeal and its predecessor<sup>5</sup> which include knowledge of possible unlawfulness as a requirement for responsibility where intention is required by a statute.<sup>6</sup> The authorities are also clear that the rule is also applicable where negligence is regarded as sufficient for the contravention. Thus even ignorance of the law may be a defence where the accused or respondent did not know or had no reasonable grounds to know the law.<sup>7</sup> Ignorance of the law was, however, not the defence put forward in this matter. The defence was simply that an error had been made by the presenter.

[9] There are no indications, as set out above, than an innocent violation of the regulation would also amount to a contravention in law. There was no evidence that the presenter contravened the regulation knowingly. Ultimately, the question is, accordingly, whether the presenter was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case a presenter at a radio station, *should* have known that the two political advertisements followed directly upon each other when she pressed the button for the second advertisement. A study of the log, which was clearly conscientiously kept by the presenter, discloses that the two advertisements were indeed placed in different blocks, which could readily have been overlooked by the presenter, who also had the added task of acting as continuity

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<sup>4</sup> 2015(2) SA 232(CC).

<sup>5</sup> The Appellate Division of the Supreme Court.

<sup>6</sup> Which includes so-called *dolus eventualis*: that is foresight of the possibility of unlawfulness and nevertheless acting – see *S v De Blom* 1977 (3) SA 513 (A).

<sup>7</sup> *S v De Blom* 1977(3) SA 513(A).

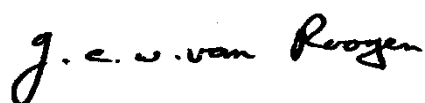
administrator – which would be typical of a community radio station, which usually has a more limited staff.

*Intention or negligence may only be found in the case where the person involved knew or should, according to the standard of the reasonable presenter, have known that she was activating two political advertisements directly after each other.*

[10] There is no evidence that the presenter had intentionally, with knowledge of unlawfulness, activated the second advertisement immediately after the previous advertisement. In the circumstances of this case the CCC is also, alternatively, not convinced that negligence was present. A reasonable presenter could, in the same circumstances, have made the same error. And, as indicated above, that is a full defence in the circumstances of this case.

[11] In so far as the placing of these two advertisements after each other by administrative staff is concerned, the fact that the advertisements were placed in two blocks could reasonably have led to this error. This conclusion is also supported by the numerous items on the log – thirty eight – between 12:00 and 15:00. Among so many items, such an error was a reasonable one to have been made. The CCC, in any case, did not investigate the administrative background to the error. The accent during the hearing of this matter was if the presenter was negligent when she activated the second advertisement. The fact that she acted in accordance with the log that was provided to her, confirms an inference that she was not wilfully or negligently contravening the provision. It would be unreasonable to expect a presenter to be that exact, in the hurly-burly of presenting and also activating numerous items.

[12] The finding on the merits of the matter before the CCC is, accordingly, that there was no intentional or negligent contravention of regulation 6(13). The charge is, consequently, not upheld.



JCW VAN ROOYEN SC

Chairperson of the CCC

3 September 2016

