

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

DATE OF HEARING: 9 April 2015

CASE NUMBER 76/2014

In the matter between:

**KEVIN HARRIS**

Complainant

and

**e.tv (PTY) LTD**

Respondent

**PANEL:**

Prof JCW Van Rooyen SC  
Cllr Nomvuyiso Batyi  
Mr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana  
Ms Mapato Ramokgopa

For the Complainant: Mr Harris in person.

For the Respondent: Mr Jonathan Berger instructed by

DATE OF JUDGMENT: 28 May 2015

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## JUDGMENT

**JCW VAN ROOYEN SC**

[1] Mr Kevin Harris is an independent film producer. Some of his films have been broadcast by South African broadcasters.<sup>2</sup> He is undoubtedly an experienced film

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<sup>1</sup> 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 has been confirmed by the Constitutional Court. 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 Consumer and Compliance Department 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 as to sanction, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

producer. He has lodged a complaint with this Tribunal claiming that e.tv, a licensed broadcaster, has unjustifiably, in terms of its licence conditions, refused broadcasting a film produced by him entitled *Living the Dream*. The film, a 46-minute production, deals with the rise to fame of a black South African Jockey.

In his complaint, Mr Kevin Harris alleges that e.tv has breached its licence conditions by not having subjected his film to a fair process before turning it down. e.tv's defence is that there is no evidence on record to support the allegations of non-compliance. According to e.tv, the evidence shows to the contrary that e.tv has complied with the licence conditions upon which Mr Harris relies.

As will appear from this judgment, there are also ICASA regulations that govern the role that a licensee must play regarding South African film producers. As required by these regulations, there is also a Protocol published by e.tv as to the broadcaster's approach to the commissioning of films by local producers.<sup>3</sup> This Protocol was approved by ICASA in 2010. The present complaint will be judged in terms of e.tv's licence, the said Regulations and Protocol.

## **BACKGROUND**

[2] On 20 August 2013, Mr Harris submitted a proposal to e.tv's manager of local productions for a 46-minute television documentary that he intended to produce.<sup>4</sup> Mr Harris indicated that he *would "take full responsibility for production and delivery of the programme to the highest professional and state-of-the-art standards"*.<sup>5</sup> In his two-page proposal, he informed e.tv that the documentary would be based on the *"life's-journey"* of S'Manga Khumalo, who – at the age of 28 – became the first black jockey to win the Durban July Handicap. Mr Harris said that it could be broadcast in two 23-minute episodes, would be produced mostly in English, with a 15% to 20% isiZulu language content. In addition he stated that this documentary could be made with a total budget of R300,000 (excluding VAT).

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<sup>2</sup> For example *Judgment Day* by Mnet in 2002.

<sup>3</sup> Published under General Notice 1596 in *Government Gazette* 32767 of 1 December 2009.

<sup>4</sup> The proposal was dated 16 August 2013.

<sup>5</sup> In the process of making the documentary, he intended to mentor the director and editor.

[3] On his own version, Mr Harris knew by 4 April 2014 that e.tv did not want to commission the documentary. According to Mr Harris, he thereafter “proceeded to independently film and produce the documentary.” On 27 August 2014, once the documentary was completed, he again approached e.tv – this time seeking to have it broadcast. Five weeks later, on 6 October 2014, Mr Harris was informed that e.tv was unable to make him an offer at that time.

[4] In his initial email to the CCC dated 14 November 2014 Mr Harris relied solely on his unsuccessful experience in trying to get e.tv to commission the documentary in alleging that e.tv had breached certain licence conditions. In particular, he relied on the following provisions of e.tv’s licence: clauses 7.2(a), (b) and (c) of Schedule 1; and clauses 3.3, 3.4 and 6.4 of Schedule 2.<sup>6</sup> Clause 7.2 provides as follows:

“The licensee shall endeavour to participate in the development of the broadcasting industry, among other things:

- (a) supporting independent contractors from historically disadvantaged groups;
- (b) supporting industry development initiatives; and
- (c) promoting the development of independent producers.”

[5] The main basis for making the allegation was the manner in which e.tv was said to have considered the proposal. As Mr Harris explained in his email to the CCC dated 14 November 2014:

*“On 20<sup>th</sup> August 2013, I submitted the proposal to Ms Keshni Rajoo, Manager for Local Production, e.tv. What transpired over the following 14 months – in my considered opinion – was a display of deflection, non-engagement & total disinterest by eTV that can in no way be seen to comply with the spirit of eTV’s licensing conditions”.*

[6] In correspondence with the Coordinator of the CCC, who had put certain questions to Mr Harris so as to clarify his complaint, Mr Harris, *inter alia*, stated as

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<sup>6</sup> He continued to rely on these provisions in his email to the CCC dated 2 December 2014.

follows:

*“However it follows from my opening premise – in my view – that in order for the licensee to genuinely endeavour to participate in the development of the broadcasting industry, it must have in place efficient, professional & transparent processes by which independent producers can engage with the broadcaster to offer program submissions.*

*This should be the case for every specific programming genre respectively. This would ensure that every legitimate submission by an independent producer gets processed in a systematic, thorough, efficient, transparent and professional manner which would again ensure that programme proposals are evaluated on merit and not in an ad hoc or haphazard way. My experience, as outlined in my presentation regarding ‘Living the Dream’ demonstrates – in my view – that there are no such systems in place at etv with regard to the genre of broadcasting. This is blatantly obvious in what transpired – and in this regard, I draw attention to etv’s manner of response to my submission from the outset.”*

[7] In replying to e.tv’s answer dated 28 January 2015, Mr Harris made it clear that his allegation regarding e.tv’s lack of systems *“with regard to the genre of documentary”* was based solely on his experience in seeking to have the documentary commissioned. In this regard, he stated that *“if e.tv claims that such processes are in place, why were they not demonstrated and implemented in their response to my submission of the documentary proposal, ‘Living the Dream’?”*

[8] At the end of his reply, Mr Harris explained what ICASA should require e.tv to show that it had complied with its licence conditions:

*“to demonstrate and prove that they have fairly processed the proposal, ‘Living the Dream’ in a systematic, thorough, efficient, transparent and professional manner that demonstrates that they have in place processes that ensure that program proposals from independent producers are given a fair appraisal, evaluated on merit & that the best of these meeting required professional standards and criteria of transformation are commissioned and broadcast.”*

[9] Mr Harris’s reply, and ultimate submission in reply to further written argument required by the CCC at the hearing of this matter, although differing in emphasis, is largely consistent with the complaint as submitted and subsequently clarified. In short, his complaint, in essence, is that: e.tv failed to follow a fair process in dealing with his proposal for the documentary. e.tv’s failure in this regard is said to serve as proof of its failure to have put in place a system to ensure that proposals for

documentaries are processed fairly. In order to satisfy the identified licence conditions, e.tv should use a fair system to process proposals for documentaries. In the absence of such a system, e.tv is simply unable to satisfy the identified licence conditions. e.tv does not have such a system in place. If it did, it would not have processed Mr Harris's proposal in the way that it did.

[10] e.tv's defence to these allegations is that this approach begs the question: what is the relationship between the proposed system for the consideration of documentaries and compliance with the identified licence conditions? e.tv argues that Mr Harris has provided no explanation. He does not, for example, show why the identified licence conditions could not be met in some other way. Nor does he, according to e.tv, provide any basis for rejecting the evidence of compliance with licence conditions provided in e.tv's answer. Furthermore, that Mr Harris has not shown why the CCC, with its clearly-defined statutory mandate, has any jurisdiction to consider what effectively amounts to a review of a commercial decision of a private party, with whom Mr Harris has no contractual relationship, on the grounds of procedural fairness. On this basis alone, e.tv submits that the complaint should be dismissed.

## **THE MERITS**

[11] e.tv's licence conditions are set out in two Schedules: Schedule 1, which applies to *"the service"*, and Schedule 2, which applies to what is actually broadcast on e.tv's free-to-air ("FTA") channel. This division draws a distinction between what e.tv does as a company on the one hand, and the programmes it broadcasts on its FTA channel on the other. The local content obligations and provisions dealing with local programming on which Mr Harris relies, are in Schedule 2.

[12] Schedule 1 deals with eight issues: the name of the service, the minimum population coverage, the target audience, language, format, employment equity obligations, skills and development obligations, and the filing of audited financial statements to ICASA. Clause 7 of Schedule 1, which deals with skills and development, is broken into three parts: one dealing with *"human resource training,*

*skills and development practices*"; another, dealing with *"the development of the broadcasting industry"*; and a third dealing with an obligation to *"recruit, train and develop individuals from historically disadvantaged groups"*. Collectively, these three provisions deal with what is expected of e.tv, as an employer, a member of the broadcasting industry and broadcaster with the capacity to develop the sector.

[13] Of the three sub-clauses of e.tv's licence, only 7.1 and 7.2 are framed in peremptory terms: according to clause 7.1, e.tv *"shall adhere"* to certain practices; and in terms of clause 7.3, e.tv *"must recruit, train and develop"*. In contrast, clause 7.2 requires e.tv to *"endeavour to participate in the development of the broadcasting industry"*.<sup>7</sup> Had ICASA intended a binding obligation, e.tv would simply have been required *"to participate in the development of the broadcasting industry"*. However, it is also true that e.tv cannot simply sit back and do nothing in this regard. It needs to show that there is a true endeavour from its side to reach these objectives.

[14] When considered as part of clause 7, in the context of Schedule 1 as a whole, the words *"supporting"* and *"promoting"* in clause 7.2 cannot, however, be read to be limited to the company's commissioning practices. Instead, they suggest that e.tv has a broad discretion to determine how it contributes towards the development of the broadcasting industry. e.tv suggests that this could be done for example, by way of bursaries and internships, or by way of preferential procurement policies, or both.

[15] It is clear, however, that the focus of Clause 7.2(c) – in particular when considered in the context of Clause 7.2 (and Clause 7) as a whole – is in *promoting development*. Mr Harris describes himself as an *"independent South African documentary film & video maker of some thirty-four years standing"* – *"an experienced filmmaker"*. He is not, in the ordinary course, the type of person to whom the clause refers.

[16] However, it is not necessary for us to spend more time on the content of the licence conditions and their applicability to Mr Harris. We should rather, within the ambit of the complaint, consider to what extent a broadcaster must apply a fair

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<sup>7</sup> Emphasis added.

procedure to un-commissioned requests to broadcasts by a local film producer. In this regard, we can accept in favour of Mr Harris that the film does deal with a matter of special interest for a developing South Africa. A jockey from a previously disadvantaged sector of the community succeeds in coming out at the top. The film itself is, indeed, of a high standard and would be of interest to a substantial number of viewers. However, the matter does not turn on this point. The question is to what extent ICASA, as an independent regulator,<sup>8</sup> is empowered to intervene in the affairs of a business, even a business that is licensed by ICASA and functions within the public sphere as a television station.

[17] Section 22 of the Constitution of the Republic of South Africa provides as follows:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or trade may be regulated by law.”

Although section 22 only refers to a “citizen”, there is no reason, within the constitutional environment in which a South African broadcaster operates, to exclude companies such as e.tv from its protection.<sup>9</sup>

The Electronic Communications Act 2005 and the Independent Communications Authority Act 2000 regulate television. The legislation does not only require that a television station be licensed, but there are limitations as to content, structure and its contribution to the welfare of the South African populace. On the other hand section 16 of the Constitution of the Republic of South Africa also guarantees freedom of expression, which includes artistic expression. Section 61 of The Electronic Communications Act provides that ICASA must make regulations which deal with the duties of broadcasters to make use of the local film industry and thereby support and enhance that industry. Such regulations were published in 2009.<sup>10</sup>

[18] At the conclusion of the hearing, the CCC requested e.tv to answer the following

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<sup>8</sup> See section 192 of the Constitution of the Republic of South Africa 1996.

<sup>9</sup> Cf. *Contract Employment Contractors (Pty) Ltd v Motor Industry Bargaining Council and Others* 2013 (3) SA 308 (LC)

<sup>10</sup> Published under General Notice 1596 in *Government Gazette* 32767 of 1 December 2009.

three questions: First, was there an endeavour by e.tv to consider Mr Harris's proposal? Second, was Mr Harris's documentary of sufficient quality that e.tv may be willing to consider broadcasting it at a later stage? Third, given Mr Harris's clarification regarding the proposed contribution originally sought from e.tv (R300,000), would e.tv be willing to broadcast the documentary? In responding to these questions, counsel for e.tv, *Mr Jonathan Berger*, argued that e.tv did not concede that this information is in any way relevant to the substance of Mr Harris's complaint. In short, the complainant alleged that e.tv is unable to meet some of its licence conditions *because it does not have a fair process in place* to consider a proposal for documentaries. The CCC agrees that on Mr Harris's version, the substantive basis for rejecting his proposal is irrelevant. In addition, e.tv persisted in submitting that the CCC would have no lawful basis to recommend to ICASA that e.tv ought to contract with Mr Harris and broadcast the documentary in the event that it comes to the conclusion that e.tv breached its licence conditions. This flows from the nature of the complaint, as discussed in the previous paragraph. We, once again, agree with this approach. However, since the relevant regulations provide for sanctions where the prescribed procedure is not in place, the CCC must establish whether the procedure was followed and, if not, what sanction should Council be advised to impose.

[19] Insofar as the e.tv channel is concerned, e.tv, as a company, commissions about five documentaries each year. In terms of the channel's programming strategy, these documentary slots are reserved for emerging producers who deliver "gritty", local stories. According to e.tv these slots, the budgets per slot, the expected audience, and expected revenue are planned carefully months in advance. e.tv put forward that there was a *bona fide* consideration of Mr Harris's proposal, with a number of e.tv's employees considering whether the documentary could be accommodated on the channel's schedules. e.tv's assessment of the proposal was that it did not fit with the channel's programming and scheduling strategy, which was already in place.<sup>11</sup> But because television is a dynamic business, e.tv took the view that it would "wait and see" if things changed, and assess whether the documentary

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<sup>11</sup> In addition, Mr Harris, according to e.tv, does not fit the profile of an emerging producer, and if e.tv were to have commissioned the documentary, it would have been in addition to the other five.



– although not a “neat fit” for the e.tv channel – could somehow be accommodated on the schedule.

[20] In answering the CCC’s question as to whether e.tv would be prepared to reconsider broadcasting the documentary, e.tv’s answer was that, regardless of the documentary’s quality, e.tv remains of the view that it does not, at present, support the e.tv programming and scheduling strategies. Should these strategies change, e.tv would need to assess the documentary again to see whether it complies fully with the channel’s technical and other specifications. At the moment, however, e.tv is not in a position to consider the documentary’s broadcast.

[21] Generally, once a production has already been completed it would only be broadcast on e.tv in terms of a licensing agreement. For a documentary of the nature produced by Mr Harris, e.tv considers a licensing fee of R300,000 to be excessive. It is significantly outside e.tv’s budgetary allowances, and even if these were to be extended, the asking price would be way beyond e.tv’s licence pricing scope.

## **FINDING**

[22] Considered from a formal perspective, e.tv has, as is required by section 61 of the ECA, published a Protocol that was approved by ICASA. Regulation 2 states the purpose of these regulations to be the following:

- (a) ensure that broadcasting service licensees submit commissioning protocols to the Authority for approval;
- (b) monitor the commissioning practices of independently produced South African programming;
- (c) ensure that commissioning practices of independently produced South African programming are conducted in a manner that is fair, transparent and non-discriminatory, without hampering the:
  - (i) flexibility of licensees to deal with pertinent commercial issues in any manner they deem appropriate,
  - (ii) independent producers’ entrepreneurial, creative, managerial and financial flexibility and control.

[23] From a monitoring perspective, no negative reports from ICASA’s monitoring

division are before us. In any case, this is not the case that Mr Harris put to the CCC. He argues that the procedure applied by e.tv was not fair. We have studied e.tv's Protocol, which is available on the internet. As was the case with Mr Harris, we also had problems in finding the Protocol on the internet. The Protocol sets out in detail what procedures will and are applied by e.tv. It is made clear that unsolicited material, in which class Mr Harris's film falls, is not the preferred method of commissioning.

[24] Ultimately, we must decide whether e.tv has complied with clause 2(c) above. Firstly it should be borne in mind that the requirement of fairness does not imply that a broadcaster must act in the manner that is required for an administrative tribunal in terms of the Promotion of Administrative Justice Act 2000. Hearings are, most certainly, not required. Even an equitable outcome is not required. What is required is "fairness" within the commercial sphere. The commercial sphere, as is well known, can get quite rough, and the word "fairness" must, realistically be understood within that context. What is more, Mr Harris knew, at the stage when production was commenced with, that e.tv was, on the face of it, not willing to broadcast the documentary.

Nevertheless Mr Harris produced the documentary. We cannot be critical of this, since a producer would often persist and believe that once the documentary is produced there might be a favourable outcome. The Regulations cited above indicate that the CCC must allow broadcasters flexibility to deal with pertinent commercial issues in any manner they deem appropriate. Ultimately, on the facts judged as a whole, we are not justified in making a finding that the procedure followed was not fair. "Fair" must be understood to mean commercially fair. Within the sphere of operation of e.tv sufficient steps were taken by it to consider the broadcasting potential of the programme. And, ultimately, financial factors played an important role. And this is the very sphere where the CCC's jurisdiction is excluded by the above-cited regulation. And, of course, the ultimate decision whether to broadcast or not lies with e.tv.

The procedure that e.tv followed is commercially permissible ("fair"), and we

could also not find any substantial departure from its Protocol. Within the sphere of operation of a television station, the procedure was fair: there was an exchange of correspondence and when Mr Harris decided to nevertheless produce the film, he was at a clear risk that e.tv could turn down the offer and not commission it. Once again, his request was considered and the film was not commissioned. In this regard, it must also be taken into consideration that unsolicited commissioning is not e.tv's preferred style of doing business – an approach that is clearly stated in its Protocol.

In the result, the Complaint is not upheld

A handwritten signature in black ink, reading "J.C.W. van Rooyen". The signature is written in a cursive, flowing style.

JCW van Rooyen SC

Councillor Batyi, Mr Medupe, Prof Moodaliyar, Mr Tlokana and Ms Ramokgopa concurred with the judgment of the Chairperson.

