

COMPLAINTS AND COMPLIANCE COMMITTEE

18 September 2017

IN RE: FUTURE DEVELOPMENT 49 (KOEPEL STEREO) VERSUS THE INDEPENDENT COMMUNICATIONS AUTHORITY OF SOUTH AFRICA

RULING

JCW van Rooyen

COMPLAINT

[1] One Future Development 49 (broadcasting as Koepel Stereo) lodged a complaint, dated 14 June 2017, with the Coordinator of the Complaints and Compliance Committee (“CCC”) at the Independent Communications Authority of South Africa (“ICASA”).¹ Its complaint is that it was not granted a renewal in 2017 by ICASA of its class broadcasting licence, initially issued by ICASA on 19 December 2011. ICASA was cited as the Respondent.

BACKGROUND

[2] Koepel Stereo was granted a community broadcasting licence by ICASA on 19 December 2011.² No term was specified in the licence. Regulations had, however, been published by ICASA in 2010³ that the term of a community

¹ The CCC is an Independent Administrative Tribunal at the Independent Communications Authority of South Africa. The CCC was recognised as an independent administrative tribunal in terms of section 33 of the Constitution of the RSA by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it by ICASA 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. In such a case the judgment is referred to Council of ICASA for noting. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order against the licensee. Council then considers an 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. 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. The present matter deals with the legal question whether the CCC has jurisdiction to hear the matter.

² CBSL No Class/Com/R171/Dec/11; RFSL No Class/Com/R171/Jan 12; CECNSL No 0273/CECNS/Jan/2012

³ Standard Terms and Conditions for Class Broadcasting Services Regulations 2010, with commencement date 12 September 2011 and amended on 30 March 2016

broadcaster would be five years. Koepel Stereo conceded that it had been unaware of this regulation as result of insufficient internal administrative support, arising from limited funds.

[3] Subsection 19(2) of the Electronic Communications Act 2005 provides as follows in this regard:

(2) Class licensees seeking to renew their class licenses must, in writing and not less than six months prior to the expiration of their class licence, notify the Authority of their intention to continue to provide the services.

Koepel Stereo, not being aware that its term had expired, did not notify the Authority in time for the renewal of the licence as provided by section 19(2). After an extension for renewal had been granted, Koepel Stereo, on its own version, submitted its application for renewal 46 working days after the date of expiry.

[4] The authority to grant community licences has been delegated by the ICASA Council to the Broadcasting Licensing Division at ICASA.⁴ It refused to renew the licence. In accordance with the law of delegation of powers the refusal was, however, the decision of the Council of ICASA. This is in accordance with the adage *qui facit per alium facit per se*. As stated by Chief Justice Centlivres in *Barkett v SA Mutual Trust & Assurance Co Ltd* 1951 (2) SA 353(A) at 361:

The maxim *qui facit per alium facit per se* or as it is sometimes put *qui per alium facit per se ipsum facere videtur* seems to be primarily a maxim which enunciates the general doctrine on which the law relative to the rights and liabilities of principal and agent depends....The principal authorises his agent to do a particular act and having used his agent as his instrument for that purpose he is bound by the act of his agent as if he had done the act himself.

DETAILS OF THE COMPLAINT

[5] Koepel Stereo states as follows in its complaint:

(a) Koepel Stereo's licence expired on 18 December 2016.

⁴ This delegation, via the CEO of ICASA, in regard to community broadcasting licences, was made possible by the ICASA Amendment Act 2014. Delegation in regard to the granting of *individual* licences is not permitted by the ICASA Act – see section 4(4)(f) of the Act.

(b) In terms of section 11(9) of the Electronic Communications Act 2005, the Authority may on good cause shown by the applicant, accept for filing, an application for renewal that is not submitted within the time period prescribed by the Authority.

(c) ICASA has taken a decision on 25 February 2014 to extend the acceptance of a late renewal notification for a period of 30 work days after expiry of the license.

(d) Koepel Stereo's application for renewal was received by ICASA 46 work days after expiry.

(e) In the case of Mosupatsela FM Stereo, their license expired on 26 October 2013 and their application for renewal was handed in at ICASA on the 20th March 2014, 104 work days after expiry.

(f) In the case of Mosupatsela FM Stereo, condonation was granted and the license renewed.

(g) We are of the opinion that ICASA was not fair in the handling of our situation and for reasons unknown, Koepel Stereo was not treated in the same way as other community radio stations are.

(h) We are of the opinion that ICASA has set unreasonably strict rules on Koepel Stereo where, with the same situations at another station, seems to be accommodating and even helpful.

We humbly request the CCC to assist in this matter.

JURISDICTION OF THE CCC

[6] In the normal course, complaints from the public or references from the Compliance Division of ICASA relate to alleged contraventions by *licensees*. The contraventions relate to licence conditions or the relevant legislation, which ranges from the Electronic Communications Act 2005, the Broadcasting Act 1999 and the Postal Services Act 1998 to several sets of Regulations pertaining to licensees. The present complaint is, however, directed at ICASA itself – in the sense that the legality of a decision by ICASA is questioned, based on alleged absence of fairness.

[7]The Complaints and Compliance Committee must ensure that its decisions, as an independent administrative tribunal in terms of section 33 of the Constitution of the RSA,⁵ are based on sound legal grounds – a principle emphasised by a judgment of the Supreme Court of Appeal. As would appear from the latter judgment, the matter turns on legality, which has often been

⁵ Recognised as such by the Constitutional Court in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC).

emphasised by this Tribunal.⁶ In this instance the legal question is whether the Complaints and Compliance Committee has jurisdiction in terms of the ICASA Act to consider this complaint.

[8] The jurisdiction of the CCC is clearly delineated by section 17C (1) and (2), 17D(2) and 17E(2) of the ICASA Act, which consistently refers to “licensees” as the respondents in the proceedings before the CCC. In fact, the CCC, ultimately, when a finding is made against a licensee, refers its recommendation as to an order against a licensee to the Council of ICASA - and the Council is, according to section 3(3) of the ICASA Act 2000, the legal entity through which the Authority acts.

[9] Section 3(5) of the ICASA Act clearly provides where the remedy for an affected person lies:

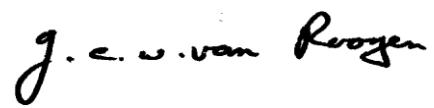
(5) A person affected by any action, finding or decision of the Authority may apply to a **court** with competent jurisdiction for review of that action, finding or decision. (Emphasis added)

[10] There is no manner in law according to which a decision of the Council of ICASA, and thus also of a committee of Council or a person or division within ICASA which acts under a delegated authority of Council, may be brought before the CCC as a Respondent. The only remedy lies in an application for review to the High Court.

RULING

⁶Thus, Navsa JA states in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013 (5) SA 24 (SCA) at para [1] “Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. *This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.”(emphasis added, footnote omitted); also see Navsa JA’s judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

[11] The Complaint is, accordingly, removed from the roll of the CCC.

A handwritten signature in black ink, reading "J.C.W. van Rooijen". The signature is written in a cursive style with a large initial 'J'.

JCW VAN ROOYEN SC

18 September 2017

Chairperson of the Complaints and Compliance Committee at ICASA.

