

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 16 September 2016

CASE NUMBER 210/2016

IN RE: SOUTH AFRICAN BROADCASTING CORPORATION LTD (LIGWALAGWALA FM)

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

CCC: Coordinator: Ms Lindisa Mabulu

From the SABC: Mr P Moilwa (General Manager: Policy and Regulatory Affairs) Ms N Monyela (Manager: Policy and Regulatory Affairs), Mr N Shibambo (Acting Manager: Regulatory Compliance), Mr A Matthee (Commercial Enterprises) and Mr Stephen Harrigan (Engineering)

From Broadcasting Compliance ICASA: Ms Fikile Hlongwane (Manager)

JUDGMENT

JCW VAN ROOYEN SC

¹ 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.

[1] Ligwalagwala FM is one of the radio broadcasters of the South African Broadcasting Corporation. An election broadcast of Liwalagwala FM was referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA. Liwalagwala FM had, allegedly in conflict with 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 a Party Election Broadcast (“PEB”) of the African National Congress when this slot was not scheduled for a PEB but for a Political Advertisement (“PA”). Regulation 4(18) provides as follows:

In the event that a political party elects to forfeit its allocated PEB air-time, then such air-time must not be allocated to another political party but must be used by the broadcaster concerned for the purpose of broadcasting its normal programming.

[2]The question is, however, whether the above Regulations had, indeed, been contravened. After having been informed of the alleged contravention by the Broadcasting Compliance Unit at ICASA, the SABC responded as follows:

1. Ligwalagwala FM did not play an unscheduled ANC PEB on the date in question.
2. A political advertisement was erroneously labelled with a wrong billboard, resulting in its being introduced as a PEB. This labelling happened at a time when the SABC was heavily flooded with political materials that needed to be broadcast immediately.
3. The SABC sincerely apologises for the contravention and is willing to provide necessary evidence, should it be required, to prove that there was indeed a financial transaction involving the said advertisement.

[3] The CCC does not doubt the facts as put forward by the SABC. The advertisement was, however, labelled as a PEB, and that is the reason why the Broadcasting Compliance Division persisted in its reference to the CCC.

[4] To this defence the Broadcasting Compliance Division responded as follows:

Please note that we have perused the SABC’s response. Nevertheless we advise that radio by virtue of the fact that its audio is a powerful medium in that information is broadcast, it can be very difficult to obtain clarification (unlike television which is both audio and visual). On this basis, it is our submission that only the SABC knew that the information broadcast by the SABC...was not an unscheduled ANC PEB but rather a PA.

Notwithstanding the reasons put forth by the SABC, the Authority's monitoring unit relied on what was said/broadcast. Accordingly, not only did this have the potential of confusing the listeners; it also resulted in it being in breach of the PEB schedule. We submit that it was incumbent upon the SABC to ensure that stringent measures were taken during the election period to circumvent such mistakes. On this basis, we submit that this 'unintended' transgression must be referred to the CCC and be dealt with in the manner befitting the CCC's processes.

[5] In effect, the Broadcasting Compliance Unit, in the above reply, amended its charge to a contravention of Regulation 5(12), alternatively, 4(14).

Regulation 5(12) provides as follows:

Content broadcast as a PA cannot be broadcast as a PEB

Regulation 4(14) provides as follows:

Content broadcast as a PEB cannot be broadcast as a PA

MERITS OF THE DEFENCE

[6] The SABC has a duty, in terms of section 57 of the ECA, to broadcast PEB's in accordance with the determination of ICASA. Other broadcasters have no duty to broadcast PEB's, but once they provide such an opportunity to one political party, section 57 also applies to them with the necessary changes. There is no duty on any broadcaster to broadcast a PA. However, as soon as it allows one political party to broadcast a PA, it is under a duty to also allow other political parties to do so.

[7] In response to the SABC's argument, the Broadcasting Compliance Division argued that no one else than the SABC would have known that the broadcast was not a PEB. That is certainly true, since content wise the two broadcasts could, at times, be confused. The main intention of the Legislature was to provide political parties with an opportunity to obtain free coverage on the public broadcaster – which is, of course, relevant for all political parties, but especially for parties with limited funds.

[8] The question is, however, whether Ligwalagwala FM had been negligent. This legally *implied* requirement of negligence is discussed in the following paragraph.

[9] The approach 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).)²

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

[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 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.'*⁴ (Emphasis added and footnotes omitted)

There are also several judgments of the Supreme Court of Appeal and its predecessor⁵ which include knowledge of possible unlawfulness as a requirement for responsibility where intention is required by a statute.⁶ The

² 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.

³ 2014 (5) SA 317 (CC).

⁴ 2015(2) SA 232(CC).

⁵ The Appellate Division of the Supreme Court.

⁶ 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).

authorities are also clear that the rule is also applicable where negligence is regarded as sufficient for a 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.⁷ Ignorance of the law was, however, not the defence put forward in this matter. The defence was simply that the mechanical system had failed.

[10] There are no indications, as set out above, than an innocent violation of the regulations would also amount to a contravention in law. There was no evidence that Ligwalagwala contravened the regulation knowingly. Ultimately, the question is, accordingly, whether the radio station was negligent in not abiding by the regulations. Negligence is present where the reasonable person, in this case the relevant management, *should* have known that the broadcast, which followed upon the announcement that followed the PEB announcement was indeed a PA.

[11] Although the CCC has understanding for the complicated tasks of a radio station, it is of the view that the tasked employee was or employees were, in the absence of expert evidence to the contrary, negligent in not having ensured that the failure would not take place. The mere fact of the municipal election, should have placed the radio station on special alert. The intention of the Regulations is that that PA's and PEB's should clearly be distinguished from each other. This did not happen and listeners were brought under the wrong impression. The Constitution of the Republic of South Africa guarantees free and fair elections,⁸ a guarantee which has been emphasised by the Constitutional Court as a cornerstone of our democracy.⁹ Fairness requires that the said broadcasts should clearly be distinguished from each other.

FINDING

[12] In the result the CCC finds that the radio station was negligent in having labelled the PA as a PEB. There was, accordingly, a contravention of the Regulations as referred to above.

SANCTION

⁷ *S v De Blom* 1977(3) SA 513(A).

⁸ Cf. section 19 of the Constitution of the RSA: (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

⁹ See *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); *DA v ANC* 2015 (2) SA 232 (CC).

As to sanction the usual possibilities as set out in section 17E(2) of the ICASA Act would apply. These possibilities must be read with section 4(3)(p) of the ICASA Act which (as amended from 2 June 2014) provides as follows:

(p) except where section 74(1) of the Electronic Communications Act applies, (the Authority) must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

The above Regulations contain no penalty in the form of a fine – in fact, neither do sections 56-59 include a fine as a sanction. However, as indicated above, the Council of ICASA may determine a penalty or remedy that may be appropriate in such cases. The CCC, in its advice on sanction to Council, believes that a fine would be appropriate in this instance. However, since the negligence was not gross and the broadcast did not, for example, take place within the forbidden 48 hours before the polling period, which is a serious contravention, a fine of R5000 would be fitting.

The SABC has a suspended fine of R35000 against it. The suspension reads as follows:

“(2) That the SABC pays a fine of R50 000 to ICASA within 30 calendar days from the date on which this order is published by ICASA. R35000 of the R50 000 is suspended for three years. Which would mean that if the SABC were found by the Complaints and Compliance Committee to have been in contravention of section 56 read with section 58(6) of the Electronic Communications Act during the said three years, it would add R35 000 to any sanction advised to Council at that stage and that Council would implement such fine.”

From the above order it is clear that the suspended R35000 is only activated if the SABC, after the said suspended fine was imposed by the Council of ICASA, is again found to have been in contravention of section 56 read with section 58(6) of the ECA. The present finding is in terms of the above mentioned Regulations and, in any case, the omission took place before the said broadcast for which a suspended fine was imposed.

APOLOGY

An apology must be broadcast five times over the News Service of Ligwalagwala FM. This accords with the approach in other similar election cases.

THE ADVICE TO COUNCIL AS TO SANCTION

[1]The station must broadcast once per day for **five** consecutive days as its **first** item on its **news** service the following statement at a time between 07:00 and 20:15 – the first broadcast being within five days of being notified by ICASA of this judgment.

Such times being notified by email to the Coordinator of the CCC at least 24 hours before the broadcast and such broadcast not being accompanied by any background music or sounds and the item being read formally as part of the News.

i- Independent Communications Authority of South Africa itfole kutsi lesi teshi sitiphatse budedengu ngekwephula imigomo yetelukhetfo. Kwatsi mhlaka 28 Kholwane , ngesikhatsi selukhetfo lwa Bo Masipala, sabita sikhangiso setema politiki ngekutsi kusakata kwelukhetfo lete politiki . Lesiteshi siyacolisa kubalaleli kanye ne ICASA ngekwephula lemigomo.

[The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Regulations. On the 28TH July, during the municipal election period, we labelled a political advertisement as a political election broadcast. This station extends its apology to its listeners and ICASA for this contravention.]

An electronic copy of each broadcast, with time of broadcast, must be sent to the Coordinator of the Complaints and Compliance Committee by e-mail within 48 hours from the last broadcast.

[2] Secondly a fine of R5000 must be paid to ICASA within thirty calendar days from when the judgment is issued. The Coordinator will provide the SABC with the bank details of ICASA and she must be copied with proof of payment within 24 hours from when the payment was made.



JCW van Rooyen SC
Chairperson of the CCC.

22 October 2016

The Members who were on the panel for this case concurred.

