



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

Date Heard: 22 January 2021

Case 378/2020

MATLOTLO MOLOI

COMPLAINANT

QWAQWA RADIO

RESPONDENT

**COMMITTEE:**

Prof JCW van Rooyen SC (Chairperson)  
Councillor Dimakatso Qocha  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Dr Jacob Medupe  
Prof Kasturi Moodaliyar  
Mr Jack Tlokana

The Complainant: Mr Matlotlo Moloj;

From the Respondent: Mr Mei Salemane (Chair of the Board);

Coordinator of the CCC: Ms L Mabulu and with her Ms X Mantshintshi

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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 in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments are referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the ICASA Act 2000, the Broadcast Act 1999, 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 and confirmed by Council 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 an order against the licensee. Council then considers a sanction in the light of the recommendation by the CCC. Fines may only be imposed where they are prescribed. A desist order may only be imposed where a contravention has taken place; a contravention thereof amounts to an offence in terms of section 17H of the ICASA Act.

## **JUDGMENT**

JCW van Rooyen SC

[1] QwaQwa Radio is a community broadcaster which broadcasts in QwaQwa, Harrismith, Kestell and surrounding areas. A member of the community, Mr Matlotlo Moloi, filed a complaint against the radio station. He had done research in the library of the Independent Communications Authority of South Africa (“ICASA”) and also included his own observations as a member of the community. At the hearing he conceded that his ideal was, in fact, to become a member of the Board of the radio station and that it was time for change and, in effect, improvement of the service. He was particularly critical of the Board and its Chairperson, arguing that the last election of the Board amounted to what could be described as manipulation. The manner in which the Board had been elected was also questioned on the basis that the Minutes did not reflect the truth. The amendment to the Constitution had also not been signed during the meeting, but a few days thereafter.

### **COMPLAINTS AS SET OUT BY THE COORDINATOR**

[2]The Complaints, which were lodged on 20 January 2020 and could only be heard on 22 January 2021 as a result of the COVID19 Pandemic, were formally set out as follows by the Coordinator’s Office at ICASA:

(a) That QwaQwa Radio had contravened article 5 of its Constitution read with clause 5.1.4 of the licence terms and conditions which provide as follows: Languages of broadcasts: Sesotho = 56% and English = 44%. It was alleged that almost all programmes are broadcast in Sesotho.

(b)Clause 6.2 of the licence conditions provides as follows: Should the licensee propose to replace the person so designated, the licensee shall notify the Authority in writing within seven days after appointing the newly designated person. It is alleged that the person who was in the position is no longer in the position.

(c)That the principal place of business was relocated without notifying ICASA of its new address.

(d) Clause 8.3 of the Respondent’s licence provides that the licensee shall facilitate in its programming the development of music, arts and culture within its coverage area. The allegation is that there is no single show or programme which invites local artists to promote their music, arts and culture.

(e) Article 11 of the Respondent's Constitution provides that amendments to the Constitution shall only be effective if carried by two thirds of the members present. It is alleged that the Constitution was amended by general vote of the members or listeners of QwaQwa radio, during an Annual General Meeting.

### **RESPONSE BY THE RADIO STATION**

[3] QwaQwa Radio responded as follows:

**3.1 As to programmes in English** it was stated that the following programmes are broadcast in English:

AM Cruise : 01:00-05:00 Sundays

Night Cap : 21:00-00h00 Sundays

Jazz : 12:00 -15:00 Sundays

Soul Food : 12:00-15:00 Sundays

Wake up and Shine 03:00-15:00 Saturdays

Good News : 05:00-07:00

News Bulletin : 15:00 - 09:00 during the week

News Bulletin : 12:00-15:00 on weekends

**3.2** The Compliance Officer at ICASA was informed of the new station manager. The previous one refused to provide the station with his ID copy and that caused the delay.

**3.3** The Station did relocate and is planning to return to the building where it originally had been. That is why the address was not formally amended. ICASA, the MDDA and Sentech were aware of the temporary move as well as the reasons why the move took place. At the hearing of the matter the CCC was informed that the station was planning to move back shortly. Official documentation was also, at the request of the CCC, provided that the relocation of apparatus had been undertaken by Sentech - which complies with Sentech requirements.

**3.4** The Respondent denied that it does not invite local artists to take part in broadcasts. It pointed out that there are six shows that invite local artists, namely:

*Ragga Hop Show*, where local artists are invited

*Top 20 Count Down Show*: the first hour of the show is for local artists.

*Manepe Show*: Invites Art and Culture music.

*Lere la Tumelo Show* : Invites local Gospel artists

*Kgeke Show*: Invites Gospel Artists (Clap and Tap)

*Seotlong Afternoon Show*: Invites up-and-coming young artists

To promote arts and culture the Station currently has a radio drama every week-day from 13:15-13:30 which is written by a local author.

*The Respondent provided supporting evidence by way of copies of broadcasts.*

Although this will always be difficult to evaluate in a matter such as the present, it at least rebutted the allegation that almost all programmes are broadcast in Sesotho, in violation of the language provision in terms of its licence. Secondly, the Respondent demonstrated successfully that the licensee, through its programming, does facilitate the development of music, arts and culture within its coverage area.

3.5 The Complainant questioned the validity of the Constitution as amended at a General Meeting held on the 2<sup>nd</sup> March 2013. He based this, inter alia, on the fact that the Constitution was signed two days after the AGM. Related questions were also raised.

*The Response was as follows:*

1. The first Constitution was accepted when the radio station was established in 2000. This was amended during the 2013 AGM and ICASA and the NCRF were represented at the meeting.
2. After the Constitution was amended in 2013, the Respondent sent the signed and amended Constitution, the Minutes of the Meeting as well as the Attendance Register to ICASA. It was said to be to the surprise of the Respondent that the ICASA library does not have a copy of the amended Constitution, as alleged by the Complainant. It was, nevertheless, attached to the present documentation before the CCC.
3. The argument that the amended Constitution was not signed on the date of the AGM was rejected by the Respondent. The amendments first had to be typed into the Constitution and conflicting parts had to be removed. It is, accordingly, understandable that it was only signed a few days after

the meeting. It was signed by the Chairperson and the Secretary of the Board.

4. A further argument was that the Chairperson had been re-elected for a further term and that this is not an acceptable practice. This practice, it was argued, lends itself to abuse and a continuation of authority. Whilst it is true that this possibility is open to possible abuse, the Respondent's Constitution, however, does not prohibit re-election.

### **REPLY BY COMPLAINANT**

[4] In his Response the Complainant's style mostly amounted to questions and demands from the radio station for evidence. This approach by a Complainant to the defence of the radio station is procedurally not permissible. A Complainant has no right to demand in a Reply answers to questions and proof thereof. The case must be made out in the initial complaint. A Complainant must reply to the defence of the station by pointing out where the station has not provided a satisfactory or correct answer. To demand material to be made available to the Complainant was thus irregular. A Complainant must state his or her case fully and then, in his or her Response to the Station's defence, indicate where it erred in her or his opinion. This it must do from its own research. Of course, the CCC may ask for more information – as was done in regard to the role of Sentech when the station was moved to a new temporary location.

[5] A further error was to base some of his complaints solely on what the Complainant found in the ICASA library. Although the library of ICASA is most reliable it is not necessarily *proof* of omissions by a radio station. It is comparable with hearsay. It might *hypothetically* very well be that a radio station files a document with the Complaints and Compliance Affairs Division of ICASA and that the document is not filed in the library. Nevertheless, the Respondent's answer was that the ICASA official knew of the move of the radio station and that since it was a temporary move it was not deemed necessary to officially inform ICASA of the move. However: when the station is moved a formal notice must be sent to ICASA. In the circumstances, the reasons provided by the station demonstrated that the omission to formally inform was not made with an

intention to contravene the law. To put it precisely, there was a *prima facie* contravention but it was not made in in bad faith or to escape the governance of ICASA. Fact is, the relevant ICASA official knew of the move. And as stated earlier, Sentech had, as required, moved and re-installed the broadcasting equipment.

[6] However: getting back to the points answered by the Respondent. The Complainant replied that during the show *Night Cap* the host mixes English and Sesotho; in *Soul Food* the host struggled to speak English, mixing it with Sesotho; in *Wake up and Shine* “the host is even worse, using Sesotho directly after playing a song.” The only satisfying English show is, according to the Complainant, *Good News*. He points out that, although not mentioned in its response by the radio station, *African Lifestyle* is “satisfactory”. He, however, gives the Respondent a “thumbs up” for inviting local artists and inspiring them in this fashion. The Arts and Culture is positive but too “broad” in his view. The complainant then analyses minutes and concludes that the radio station does not do what it alleges to do – time wise.

[7] The Complainant then raises questions as to validity of the Board of the Station and the moving of the radio station. The matter as to the Board has already been dealt with: there is no reliable evidence that it was not elected validly. Two independent officials were also present at the meeting and there was no evidence that any miscarriage of justice had taken place. The moving of the broadcasting apparatus was done formally by Sentech. It is true that a formal notification should have been lodged with ICASA, but ICASA knew about this. From a humane perspective it would be unrealistic to find against the station in this regard. Modern, constitutionally based Law has an inbuilt quality of understanding human conduct built into it after ages of despotism under apartheid. Why would one expect formal information to be lodged where everyone involved knew that the station had been re-located? The concept of *Ubuntu*,<sup>2</sup> as employed by our Courts, including the Constitutional Court, points

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<sup>2</sup> See HM du Plessis *The harmonisation of good faith and ubuntu in the SA common law of contract* ( Doctoral Thesis University of South Africa 2018).

to a more equitable standard which amounts to a defence in *this* case. A few dicta from our Courts illustrate this well:

*Ubuntu* was a fundamental consideration for the Constitutional Court when, in *S v Makwanyane*,<sup>3</sup> it held the death penalty to be in conflict with the 1994 Interim Constitution. Of course, at that stage, *Ubuntu* was explicitly included in the Interim Constitution as a founding value. However, in spite of the concept not having been included in the 1996 Constitution, it has remained part of the reasoning of our Courts, including that of the Constitutional Court. Although it has been referred to in numerous reported judgments, its specific role in especially contracts, has yet to be determined. However, the present matter does not concern a contract, but a condition in a license, which requires a report to ICASA. The following statements were made by the Justices in *Makwanyane* in regard to *Ubuntu*:

By Mahomed J:<sup>4</sup>

[263] The post-amble to the Constitution gives expression to the new ethos of the nation by a commitment to 'open a new chapter in the history of our country', by lamenting the transgressions of 'human rights' and 'humanitarian principles' in the past, and articulating a 'need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'. 'The need for *ubuntu*' expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

By Langa J:<sup>5</sup>

It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The

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<sup>3</sup> *S v Makwanyane* 1995(3) SA 391(CC).

<sup>4</sup> The later Chief Justice at [263].

<sup>5</sup> The later Chief Justice at [224].

person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all...”

By Mokgoro J:<sup>6</sup>

“Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse communities.”

In respect of a legal duty to support, the Supreme Court of Appeal has regarded *Ubuntu* as one of the relevant Constitutional values.<sup>7</sup> The court also, in a defamation action, remarked *obiter* that substantial recognition should be attached to the values embodied in *Ubuntu* under the rubric of dignity, but did not decide the matter, in the light of the facts before the Court.<sup>8</sup> In a further matter the Court held that *Ubuntu* placed an ethical duty on an attorney to respond to the requests of a guardian on how funds were dealt with.<sup>9</sup>

In a matter concerning indigenous law, Mokgoathleng J in *Sengedi v Tsambe: in re Tsambo*<sup>10</sup> applied *Ubuntu* when, on an urgent basis, the Court had to resolve a dispute between a widow who, according to African customary law, claimed the right to bury her husband in Johannesburg, whilst, on a high level – as a

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<sup>6</sup> At [308].by Mokgoathleng J.

<sup>7</sup>*Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA).

<sup>8</sup> *Manyatshe v M&G Media Ltd & Others* [2009] JOL 24238 (SCA).

<sup>9</sup> *Law Society, Northern Provinces v Mogami and Others* 2010 1 SA 186 (SCA).

<sup>10</sup> [2018] JOL 40655 (GJ).



result of the prominent role that the husband had played in society - arrangements had already been made and advertised for the ceremony to take place in Mahikeng, the next day. The Judge held that the rights of the wife to decide on the place of burial were, in the particular circumstances, limited by *Ubuntu* and that the arranged ceremony would take place as advertised.

On the whole, our Courts have referred to *Ubuntu* in numerous cases, despite the fact that the 1996 Constitution does not include the concept. It has, in fact, rightfully become part of our common law and has and will, *inter alia*, also fill a devastating gap caused by apartheid.

There is, accordingly, no reason why a strict application of the licence condition of reportage should be applied in the QwaQwa matter before this Tribunal. *Ubuntu* provides a realistic and understanding approach to the duty to report when all relevant persons already knew of the fact that the station was moved. In fact, a prominent role player, Sentech, effected the transfer of the apparatus. And, it is undisputed that the contact person from ICASA knew about the move.

*The complaint in this regard is, accordingly, not upheld.*

[8] Insofar as the use of English is concerned, it is clear that the required percentage was not reached. *The complaint is, accordingly, upheld.*

[9] Insofar as *local talent* and local relevance is concerned *copies of broadcasts were filed* with the Coordinator's Office in relation to this allegation by the Complainant.

1. English news feed broadcast (3 recordings)
2. Ragga hop show - invites local artists
3. Top 20 count down show – part of the show is for local artists
4. Manepe show – interviewing upcoming artists
5. Lere la tumelo show - Invites local gospel artist
6. Kgekge ya molatswaneng - Invites gospel artists
7. Seotlong Afternoon drive show- Invites upcoming young artists.

To judge these requirements is, of course, most problematic. For that there would have to be a continuous watch by ICASA, which would remind of abhorrent times of censorship under the Rule of apartheid – the latter having been declared justifiably, under the *Statute of Rome*, to be a crime against

humanity. In any case, ICASA undertakes annual samples of live broadcasts and experience has shown that it is difficult to make definite deductions from samples. Where time is measured during elections, the monitoring is, of course, continuous and definite results are reached. However, even in such a case the CCC held that, given the massive number of election advertisements which the SABC dealt with, a few errors were understandable and that the SABC had not been negligent in law.<sup>11</sup> In fact, a result which also accords with *Ubuntu*, discussed above.

### **CONCLUSION ON THE MERIT OF THE COMPLAINTS**

[10] Returning to the Complaint as set out by the Coordinator's Office:

(a) That QwaQwa had contravened article 5 of its Constitution read with clause 5.1.4 of the licence terms and conditions which provide as follows: Languages of broadcasts: Sesotho = 56% and English = 44%.

*FINDING:* Judged as a whole the evidence and argument before the CCC indicate that this condition is not being met by the radio station. **The complaint is upheld.** We will get back to this aspect in the CCC's advice to Council.

(b) Clause 6.2 of the licence conditions provides as follows: Should the licensee propose to replace the person so designated (as contact person), the licensee shall notify the Authority in writing within seven days after appointing the new designated person. It is alleged that the person who was in the position is no longer in the position.

*FINDING:* The Respondent has explained the situation which arose satisfactorily. The person in the position was not willing to supply his ID number and the defence of impossibility was raised. However, **the complaint is upheld** since ICASA should have been informed about the impossibility. The matter has, in the meantime, been rectified.

(c) That the principal place of business was relocated without notifying ICASA of its new address.

*FINDING:* ICASA's representative as well as Sentech knew about the relocation and it would be unfair and in conflict with *Ubuntu*, as explained above, to find against the station. **The complaint is not upheld.**

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<sup>11</sup> *In Re SABC Case 356/2019.*

(d) Clause 8.3 of the Respondent's licence provides that the licensee shall facilitate in its programming the development of music, arts and culture within its coverage area. The allegation is that there is no single show or programme which invites local artists to promote their music, arts and culture.

*FINDING:* The radio station has provided satisfactory recorded evidence that such facilitation takes place. **The complaint is not upheld.**

(e) Article 11 of the Respondent's Constitution provides that amendments to the Constitution shall only be effective if carried by two thirds of the members present. It is alleged that the Constitution was amended without the required majority.

*FINDING:* There is insufficient, if any, evidence that the amendments were not supported by a two thirds majority. **The complaint is not upheld.** It should be added that the Constitution of the Respondent does not prohibit the re-election of the previous Board.

Generally, it should be observed that a Complainant must set out and motivate its Complaints in its initial complaint. Although the CCC has an inquisitorial function and this function has been held to be in accordance with the Constitution of the Republic, the CCC cannot add more complaints. Neither may the Complainant add to his or her complaints when he or she responds to the defence of the Radio Station. Furthermore, the Constitutional Court has cautioned that the inquisitorial function may never deteriorate into becoming unfair.<sup>12</sup>

#### **ADVICE TO COUNCIL**

**[11] The result of the inquiry, as delineated by the Coordinator, is thus that the Respondent is found to not have contravened Complaints as set out in subparagraphs (c), (d) and (e).**

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<sup>12</sup> *Islamic Unity Convention v Minister of Telecommunications 2008 (3) SA 383 (CC); S v Kemp 2019 LexisNexis 44155(EGC).*, nor bet

[12] A question that arose is whether ICASA should not order, in the light of the complaint that the Chairperson as per the QWAQWA Radio Constitution could, on re-election, remain the Chairperson indefinitely, that the Constitution must be amended so that more than two terms as chairperson should not be permitted. The answer, however, lies in what the High Court, as per Matojane J held in *S.O.S. Support Public Broadcasting Coalition & Others v SABC*<sup>13</sup> at paragraph [10]:

“ICASA is not empowered to determine and regulate the relationship between a broadcaster and its shareholders,<sup>14</sup> nor between the broadcaster and the Executive, or the legal and constitutional issues arising in this matter. *It is also not empowered to determine the constitutionality or otherwise of the governance and management structures of broadcasters, including the SABC.*”  
(Accent added)

[13] However, the radio station is found to have contravened as follows:

That QwaQwa Radio has contravened clause 5 of its Constitution read with clause 5.1.4 of the licence terms and conditions which provide as follows: Languages of broadcasts: Sesotho =56% and English = 44%. It was alleged that almost all programmes are broadcast in Sesotho.

**FINDING:** Judged as a whole the evidence and argument before the CCC indicate that this condition is not being met by the radio station, although attempts are constantly made to employ English.

This is a contravention and Council is advised as follows:

To order QwaQwa Radio to comply with the above clause 5.1.4 by 31 January 2022.

That Council is advised to direct the CCA of ICASA to undertake an inspection as to compliance thereafter.

However: the above should, with respect, be read with the advice hereunder.

**ADVICE TO COUNCIL AS TO ITS FUNCTIONS IN TERMS OF SECTION 17B of the ICASA Act**

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<sup>13</sup> (Case 81056/2014 handed down in October 2017.

<sup>14</sup> In *Qwa Qwa Radio Members*.

**Section 17B of the ICASA Act provides as follows:**

**17B. Functions of Complaints and Compliance Committee**

The Complaints and Compliance Committee -

- (a) must investigate, and hear if appropriate, and make a finding on -
  - (i) all matters referred to it by the Authority;
  - (ii) complaints received by it; and
  - (iii) allegations of non-compliance with this Act or the underlying statutes received by it; and
- (b) may make any recommendation to the Authority necessary or incidental to -
  - (i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or
  - (ii) achieving the objects of this Act and the underlying statutes.

Given the population of the area into which QwaQwa Radio broadcasts (QWAQWA, Kestel, Harrismith and surrounding areas) it is a reasonable question whether the required percentage English should not be reduced by ICASA to, for example, 20%. ICASA, it is suggested, should research whether a high percentage (44%) of English corresponds with the percentage Sotho speaking inhabitants, especially in QwaQwa itself. Of course, the Radio Station should also be consulted.

[12] As to the omission to inform Council as to the contact person. The Respondent is directed to desist from a further contravention of this licence condition. It should be noted that non-compliance with a desist order could lead to a prosecution in terms of section 17H of the ICASA Act.



**Prof Dr JCW van Rooyen-Senior Counsel**

**Chairperson**

**The Members agree**