

**COMPLAINTS AND COMPLIANCE COMMITTEE OF THE INDEPENDENT  
COMMUNICATIONS AUTHORITY OF SOUTH AFRICA**

**Date of hearing: 10 June 2011**

**Case No: 48/2011**

In the matter between:

**THE LICENSING AND COMPLIANCE DIVISION OF ICASA**

**Complainant**

And

**MOSUPATSELA FM STEREO**

**Respondent**

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**MEMBERS OF THE COMPLAINTS AND COMPLIANCE COMMITTEE**

Judge IWB de Villiers

Acting Chairperson of the CCC

Ms N Batyi

A Councillor of ICASA

Ms N Ntanjana

A Member of the CCC

Mr Z Ntukwana

A Member of the CCC

Mr J Tlokana

A Member of the CCC

Ms T Ramuedzisi

A Member of the CCC

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**OTHER PERSONS ATTENDING THE HEARING**

Ms F Hlongwane

Manager, Broadcasting Compliance

Assisted by:

Mr K Mokitle and Ms B Kunene

Compliance officers, Licensing and  
Compliance Division of ICASA

Mr L Mamatu

Chairperson of the Respondent's board of directors

Mr M Hlobo

Secretary of the Respondent

**Intervening persons:**

Mr S Mosala

A member of the community

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Mr K Kanapi	A member of the community and a former Secretary of the Respondent
Mr S Segami	Programme Manager of the Respondent
Mr Precious	An employee of the Respondent
Mr T Bunu	The Acting Station Manager of the Respondent

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## JUDGMENT

Judge IWB de Villiers:

- 1) The Applicant is the Licensing and Compliance Division of ICASA. The Respondent is a community radio station which has a geographic coverage area of Botshabelo, Morakge, Thaba-Nchu and surrounding areas in the Free State Province. The Respondent is an association not for gain, registered in terms of s21 of the Companies Act, No 61 of 1973, and recognised by the Companies Act, No 71 of 2008, which came into operation during 2011.
- 2) The Applicant has brought a charge against the Respondent before the Complaints and Compliance Committee ("CCC") of ICASA that Respondent has failed to comply with its licence terms and conditions by failing to hold annual general meetings (AGMs). The last annual general meeting (AGM) was held in October or November 2008.
- 3) Ms Hlongwane, the Manager of Broadcasting Compliance, assisted by Mr K Mokitle and Ms B Kunene, appeared on behalf of the Applicant.

Mr L Mamatu, the chairperson of the board of directors of the Respondent, appeared on behalf of the Respondent, together with Mr L Hlobo, the Secretary of the Respondent.

Several intervening persons who oppose the board of directors of the Respondent, appeared. They are Mr S Mosala, who initially introduced himself as the Managing Director of the Respondent, but later, after a dispute arose about such designation, described himself as a member of the community. Mr Kanapi, also introduced himself as a member of the community. Later Mr Mamatu said that Mr Kanapi is a former Secretary of the Respondent. Mr S Segami, and Mr T Bunu introduced themselves respectively as the Programme Manager and Acting Station Manager of the Respondent. Mr Precious stated that he is an employee of the Respondent.

- 4) It is common cause that the Respondent has failed to hold several annual general meetings. All the interested parties are agreed that an AGM of the Respondent should be held as soon as possible. The dispute between the representatives of the Respondent and the intervening parties centres around the control of the Respondent. Indeed it seems that the existing directors are not fully in control of the Respondent's affairs.

Background of the dispute:

- 5) According to Mr Mamatu, the present board of directors arranged for an AGM to be held on 16 May 2010 but it had to be cancelled at the eleventh hour after board members received threats from certain members of the community. He states that the police advised the board not to proceed with the AGM as the situation was volatile and could lead to violence and loss of life. See Messrs Mamatu's and Hlobo's letter to the Applicants in response to the charge sheet, dated 14 February 2011 (at p4 of exhibit "B").

- 6) According to Ms Hlongwane, the Applicant received correspondence saying that certain persons held an “AGM” on 16 May 2010 and constituted a so-called Interim Committee. However, the Applicant informed the CCC that it could not recognise the Interim Committee as the board of the Respondent because no “dissolution” of the existing board had taken place in accordance with the articles of association (“articles”) of the Respondent. This is not disputed. Article 23(1) supports Ms Hlongwane’s view. According to Mr Mamatu’s said letter the “new” board constructed by the Interim Committee, ceased to exist after the existing board had filed a complaint with the Authority about the manner in which the “new” board had been appointed.

The Applicant recognises the existing board of directors as the lawful directors of the Respondent since they were lawfully elected in 2008 and have not been ousted as directors by the events of 16 May 2010. We have no reason to differ from this point of view in regard to the lawfulness of the existing board. It follows that persons who are exercising control over Respondent’s activities contrary to the authority of the existing board of directors, are doing so illegally.

- 7) According to Mr Mamatu’s said letter, the existing board once again attempted to hold an AGM during August or September 2010, but this was sabotaged from within the station when some individuals who claimed to be managers of the station refused to air promotions relating to the calling of the AGM and used the station’s airtime to discourage members of the community from attending such a meeting. Some of the presenters who wanted to see the Respondent holding its AGM and who had agreed to assist the existing board, were intimidated, suspended and dismissed, after being labelled as sell-outs, etc.



- 8) According to Mr Mamatu, there are presently parallel banking accounts in the name of the Respondent, one of which is being illegally run by Mr Mosala. The existing board has laid a criminal charge with the South African Police Services in regard to this. Mr Mamatu also complained that "very bad things are being said on air". From averments such as these it appears that the existing board is not fully in control of what is happening at the station. Indeed, it seems that the Interim Committee was for some time illegally in control of the station and even now is still exercising control over certain aspects of the station.
- 9) Of course, such a situation is completely unacceptable and unlawful. The Respondent did take legal action against certain individuals, including Mr Mosala, in the Free State High Court. On 23 March 2010 a rule nisi was issued in Respondent's favour against these individuals, which interdicted them from impeding, disrupting or interfering with the station's operations, management, clientele, listenership, board of directors or its employees. The interim orders were made final on 3 June 2010 (see exhibit "C"). It seems that, despite such order, disruptions and disagreements of all sorts are still taking place at the station.
- 10) In a letter, dated 1 June 2011, written on the station's letterhead, addressed to Ms Lindisa Mabulu, the Co-ordinator of the CCC, Mr S Mosala (calling himself "Station Manager") and Mr J Jones (calling himself "Programme Manager") complained about the "non-existent" board of directors of the Respondent "because they have been absent from the station since February 2009 but continue to use station money till July 2011". They complain that since the board has been in control, the station is "in a mass of debt" and furnish details of such averments. They pray that the CCC should rule that the board of the Respondent be dissolved and that a Task Team be established to

convene an electing AGM i.e. an AGM where directors may be elected. At the hearing Mr Mamatu moved for a postponement of the hearing in order to afford the board an opportunity of dealing with Mr Mosala's letter and other similar letters which had been addressed to Ms Mabulu shortly before the hearing. The CCC considered that it would not be in the interests of justice to postpone the hearing. Every interested party was granted a full opportunity of addressing the CCC on all the issues.

It is obvious that there is much ill-feeling between the existing board and the persons who have intervened in the matter. Indeed, as indicated, Mr Mamatu objected to Mr Mosala calling himself the Managing Director of the Respondent and pointed out that in terms of par 2.5 of the order of court dated 23 March 2010, read with par 1 of the order of 3 June 2010, Mr Mosala and others had been interdicted from holding themselves out as the authorised spokespersons, agents and or representatives of the Respondent. Mr Mosala, accordingly, agreed to address us merely in his capacity as a listener of the station.

- 11) It is clear from the foregoing that the existing climate makes it virtually impossible for the existing board to arrange and conduct an AGM. But, quite apart from that, there are numerous other practical problems which make it very difficult for the board to arrange and conduct an AGM.

Legally the existing board still exists:

- 12) One aspect is, however, quite clear, namely that the existing board has not legally been disempowered. Legally, it still exists and should be in control of all the affairs of the Respondent. Legality is an important principle of our law. Only

the existing board is entitled to control the activities of the Respondent. No one else is entitled to do so. All persons who are illegally exercising control over the Respondent and its affairs should immediately cease to do so and should hand over full control thereof to the existing board. If Mr Mosala has opened a banking account in the name of the Respondent, as alleged by Mr Mamatu, he should immediately hand over the control of such account to the existing board of directors and should properly account to them and the Respondent's auditors in respect of all transactions which have taken place in that account since the day it was opened up to the day he hands over control of the account. The same applies to all other activities of the Respondent which are being carried on illegally contrary to the wishes of the existing board. The CCC recommends to the Authority that all this should take place under the guidance and assistance of the Manager, Broadcasting Compliance and her staff to ensure that all necessary steps are taken to place the existing board in full control of the Respondent so that a full account of what has taken place in the Respondent's affairs since the previous AGM may be given to the members of the Respondent at the following AGM, together with a balance sheet, as well as income and expenditure accounts of the Respondent.

An AGM must be held as soon as possible:

- 13) We also recommend to the Authority that the Respondent should be ordered to desist from any further contraventions of its licence conditions by holding an AGM as soon as possible. We realise, however, that because of the chaos presently existing in the Respondent, it will not be practicable to hold such an AGM before the existing board has once again acquired full control over all the activities of the Respondent, the auditors of the Respondent have properly investigated the Respondent's books of account and are able to draw up a balance sheet and

income and expenditure accounts so that a proper account of Respondent's financial position may be given to the members of the Respondent at such AGM and there is a reasonable prospect of rescuing the Respondent. As indicated, this should also take place under the guidance and assistance of the Manger, Broadcasting Compliance and her staff.



Is the Respondent financially distressed?

14) There appears to be a distinct possibility that the auditors of the Respondent may come to the conclusion that the Respondent is “financially distressed”, as defined in s128(1)(f) of the Companies Act, No 71 of 2008, which came into operation on 1<sup>st</sup> May 2011, namely that-

- “(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
- (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.”

If the auditors establish that the Respondent is “financially distressed”, as defined in the Act, and, in their view, there appears to be a reasonable prospect of rescuing the Respondent, the board of directors may resolve in terms of s128(1) of the Act, that the Respondent begins business rescue proceedings and places the Respondent under supervision, ie. the oversight imposed on a company during its business rescue operations. Legal advice should also be obtained by the board of directors in relation to the matter.

The court may set aside the Respondent’s resolution and may make an order placing it under liquidation if, for instance, the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company (s130(5)(c)).

The CCC recommends that the Authority should direct the Respondent to take remedial steps to establish whether it is financially distressed, and should begin

business rescue proceedings if there is a reasonable prospect of rescuing the company, alternatively whether the company should be placed in liquidation. See more below.

Further issues:

15) During the hearing a number of further issues were debated which should be dealt with in this judgment. These issues relate to problems which are at this stage foreseeable and in respect of which the CCC should make further recommendations to the Authority.

The term of office of directors:

16) The first of these further issues is whether the forthcoming AGM may in terms of the articles elect other directors in the place of the existing directors. According to Mr Mamatu, he and the other directors of the Respondent were chosen as such at the AGM held in October or November 2008. If this is established as correct, as indicated in the next paragraph, the next question is for what period of time were the directors elected. Article 9.1 is self-contradictory in this regard. It provides that the ten directors "hold office for a period of three (4) years". However, articles 18.1.5 and 18.1.6 support the view that four years are intended and that the reference to "three" years in article 9.1 is a mistake. Articles 18.1.5 and 18.1.6 provide as follows:

"The duties of the Annual General Meeting shall, inter alia, be to-

18.1.5 elect the Executive Committee members of the Board of Directors according to their positions, applicable only after r 4 years of office

18.1.6 elect Head of Sub-committees randomly without position applicable only after r 4 years of office" (underlining as in the articles).

The letter "r" in both sub-sections appears to be a typing error. It has no meaning and should, accordingly, in my view, be ignored.

The members of the Executive Committee of the Board of Directors and the Heads of Sub-committees are dealt with under the heading "The Committees of the Board of Directors" in articles 11.1 and 11.4 respectively. (See also articles 9.1 and 9.2).

Directors are, therefore, chosen by the AGM to hold office for a period of four years.

When were the existing directors appointed?

17) A factual issue, flowing from the previous paragraph, is whether Mr Mamatu's averment is correct that he and the other directors were chosen at the AGM held in October or November 2008. We recommend that Ms F Hlongwane, and members of her staff, should be requested by the Authority to guide and advise the board of the Respondent in relation to all matters relating to the holding of the AGM, including the question whether Mr Mamatu and his co-directors were indeed appointed as directors in October or November 2008. This would have to be checked against available records, the minutes of that AGM and other available evidence. The provisions of articles 12.1 and 12.2 would also have to be taken into account. We also recommend that a legally qualified officer should

be appointed to assist Ms Hlongwane and her staff since legal issues abound in this case.

If it appears that Mr Mamatu and his co-directors were indeed appointed in October or November 2008, it is clear that their four year period of appointment has not yet expired and will only expire in October or November 2012, depending on the precise date of the AGM in 2008. The result would be that the AGM may not, in terms of articles 18.1.5 and 18.1.6, elect the Executive Committee members of the board of directors or elect the Heads of Sub-committees unless the AGM were postponed until expiry of the said four years. It would, however, not be advisable for the AGM to be postponed until then. Much depends on the financial position of the Respondent. If business rescue proceedings must first take place, the AGM may have to wait.

A resolution that the board of directors should dissolve:

18) Article 23.1 (wrongly numbered as “24.1”) provides that “the Board of Directors may dissolve or cease its function on account of:

23.1.1 a resolution of seventy-five (75%) vote of the members present at the general meeting providing the resolution is stated prior to the notice and agenda of the general meeting and the reasons thereof.”

An AGM is, of course, also a general meeting. “General meeting” is not defined in the articles but would include an AGM or the special general meeting referred to in article 24.2.1.



The persons who oppose the present directors may, of course, wish to use the provisions of article 23.1 to attempt to oust them as directors. The precise mechanism of a resolution to dissolve the board of directors is not spelled out in article 23.1. In my view, a written proposal of a member that such a resolution be adopted at the AGM, duly seconded by another member, would be required wherein, as provided by article 23.1.1, the reasons for the resolution are fully set out. The said proposal should be delivered timeously to the secretary of the board of directors so that the contents of the proposal and the reasons thereof may be contained in the notice of the meeting which is sent to members together with the agenda of the general meeting in terms of article 23.1.1. It is not stipulated how long before the AGM the proposal should be delivered. We suggest that, for practical reasons, such proposal should be delivered to the secretary of Respondent no later than 30 days before the AGM. As indicated below, the notice of the meeting should stipulate all these requirements.

Once again, it is vital that Ms Hlongwane and the members of her staff should advise and guide both the existing directors, as well as their opposition, in relation to the correct steps that should be followed to comply with the provisions of article 23.1 and the other provisions of the articles.

- 19) Article 23.1 does not expressly provide for the election of new directors in the event that the existing board of directors is dissolved or ceases to function. In our view, the provisions of article 8, which relate to elections to the board of directors, would be applicable in such a case. In other words, if a written proposal in terms of article 23.1 is received, the directors should appoint electoral officers to administer the election of directors in terms of the articles, in the event that the proposal for dissolution of the existing board of directors is accepted by 75% of the members present at the AGM. The electoral officers may, in terms of

article 8.1.1, submit further procedures consistent with articles, "in order to conduct a smooth and fair election".

- 20) In view of our suggestion that a written proposal to dissolve the board of directors should be delivered to the directors at least 30 days before the AGM, it follows that notice of the date of that AGM should be given at least 60 days before the date of the AGM to allow members sufficient time to deliver a proposal in terms of rule 23.1 that the board of directors should dissolve or cease to function, if they wish to do so.

Access to membership of the Respondent:

- 21) During the hearing before the CCC we asked Mr Mamatu how many members the Respondent has. He was unable to provide any figure. However, Mr Hlobo, the secretary of the Respondent, stated that there are "about 300 and something" members. This may be a low figure considering that Respondent has about 120 000 listeners and the fact that the community which it serves should be well represented by the members of the Respondent.

According to Mr Kanapi, a former secretary of the board until 2008, the strategy of Mr Mamatu has been to issue only certain persons with membership. Mr Kanapi submitted that the issue of membership, if not addressed properly, would exclude a large number of persons from participating democratically in the decisions of the Respondent. He accordingly submitted that for the forthcoming AGM the issue of membership should be set aside. That would be directly in conflict with the articles. Accordingly, the CCC is not entitled to make such a recommendation to the Authority. This was conveyed to the persons attending the hearing. The articles of a company constitute a statutory agreement between

the company and its members and between the members themselves. The CCC and the Authority may not override the provisions of the articles. In terms of articles 8.5 and 17.4.1 only members who are in good standing with their annual membership fees, may vote. In other words, only members who have paid their annual membership fees up to date, are entitled to vote. (Voting rights of members are dealt with in detail below).

Mr Mamatu denied that the board was denying anyone access to membership. He alleged that it has been made publicly known in the media that listeners should apply for membership of the Respondent.

It was pointed out to Mr Mamatu that article 7.5 could potentially be misused by the board to exclude an applicant for membership on the basis that he/she "holds beliefs or engage(s) in activities that are contrary to the aims and objectives (of the Respondent) or is involved in activities generally regarded by the Board of Directors as detrimental to (the Respondent)".

Mr Mamatu acknowledged that the articles could be misused, but denied that anyone's application for membership had ever been refused in terms of such provision. In answer to a question by Councillor Batyi he stated that the Board has never exercised the provisions of article 7.5. Mr Mamatu undertook that the Board would not exercise its powers in terms of article 7.5 in respect of any application for membership in respect of the forthcoming AGM.

Voting rights of members:

22) It is important that Respondent's listeners should be timeously enlightened by means of broadcasts and notices (more of this later) of the important fact that the



articles of the Respondent provide (in article 8.5) that “only members who have paid-up membership and received invitations shall have voting rights”. The words “and received invitations” are clarified by article 17(8) which provides that “notices of invitation to the AGM shall be sent” 21 days before the date of the AGM to all members by post/facsimile, email or by hand. In other words, such written invitations to the AGM must be sent by the Respondent to all members who are in good standing with their annual membership fees. We suggest that such an invitation may also be received by a member at the place where he/she delivered his/her application for membership if he/she has indicated in such application that he/she wishes to receive their notice of invitation at that place.

The CCC was informed that membership fees are R10. Article 17.6.1 refers to “annual membership fees”. We infer that the annual membership fees are R10 per year. This must, of course, be checked.

23) In our view, it is vital that the Broadcasting Compliance Unit of ICASA should offer guidance and assistance to the board of directors in establishing-

23.1 who the present members of the Respondent are;

23.2 whether the membership fees of such members have been paid up to date;

23.3 in the event of a member not being up to date with such payments, he/she should be given written notice at least 60 (sixty) days before the AGM that he/she is not up to date with such payments and should be informed what amount is due and payable in order to comply with the requirement of “paid-up membership” and that if he/she does not pay the outstanding amount at least 30 (thirty) days before the AGM he/she will not be entitled to vote at such AGM but will be entitled to attend the AGM as a non-voting delegate



provided he/she has registered as such at the places where such registration may take place, by completing a registration form and handing it to the person who is in control of registration at such a place. A document should be handed by such person to the member proving that registration has taken place. We suggest 30 days because article 17.3 requires the Respondent to send out written notices of invitation to the AGM at least 21 days before the date of such AGM.

The fact that the Broadcasting Compliance Unit offers guidance and assistance to the board of directors, will of course, not in any way diminish the duties of the board of directors to properly exercise control over who has or has not complied with his/her obligation to pay annual membership fees.

How to become a member of Respondent:

24) Listeners who are not members can become members with the right to vote at the forthcoming AGM provided the requirements of the articles are met. Listeners should be enlightened by broadcasts and written notices (more of this later) of their rights in this regard. Firstly, article 7.1 provides that "membership shall be open to all members of the community and organisations who commit themselves to the aims and objectives of Mosupatsela FM Stereo including its constitutional principles, in areas that Mosupatsela FM Stereo broadcasting licence covering is extended". Article 7.2 provides that "all membership shall be processed upon receiving an application". Appropriate forms relating to application for membership should be made available to listeners at places stipulated in Respondent's broadcasts and written notices (more of this later). Provision should be made in such notifications that completed forms should be

handed in at specified places together with payment of the annual membership fee of R10.

In our view, broadcasts and written notices in this regard should commence at least 3 months before the date of the AGM and should continue until the date of the AGM.

Listeners should, accordingly, be notified that applications for membership received by the Respondent later than 30 days before the AGM will not be taken into account by the board of directors, in other words such applications will fail because they are too late. In our view, there must be such a cut-off point to enable the Respondent to prepare the said written invitations to members in terms of article 17.3.

Paid-up members must also register as voting delegates:

25) The broadcasts and written notices to listeners must also draw listeners' attention to the provisions of article 17.5 which provides that "no person shall be allowed to the AGM as delegate(s), unless he or she has registered and forwarded their name(s) in accordance with the announcement". The word "announcement" refers, in our view, to the announcement of the date, time and place of the AGM. In order to be allowed to the AGM as a "voting delegate" the person must-

- (a) have paid-up membership of the Respondent;
- (b) have received a written invitation from the Respondent to the AGM 21 days before the AGM;
- (c) have registered and forwarded his/her name to the Respondent that he/she intends to attend the AGM.

The articles do not provide how long before the AGM a member should register and forward his/her name to the Respondent or what form the forwarding of his/her name and the registration should take. We suggest that each member should register by completing a registration form at the same place where application forms for membership may be obtained, and that he/she is regarded as registered as soon as he or she has handed a duly completed registration form to the person who is in control of registration at such a place. A document proving such registration should be handed to the member by the person in control of registration. We suggest that registration should take place at least ten (10) days before the date of the AGM to enable the Secretary to draw up a list of members who have registered as voting delegates.

For safety sake, the fully paid-up member should be in possession of the following documents when he/she attends the AGM:

- (a) a notification from the Respondent that he/she is a member of the Respondent;
- (b) receipt(s) showing that he/she has paid-up membership of Respondent;
- (c) a notice of invitation to the AGM sent to the member at least 21 days before the AGM;
- (d) a notification from the Respondent that the member has duly registered as a voting delegate.

26) It certainly is not easy for a member to comply with all the above requirements in order to vote at the AGM but it is not impossible. The above procedures should be simplified by means of appropriate amendments to the articles, by means of a special resolution of the Respondent, at some time in the future. It is necessary



that the Broadcasting Compliance Unit of ICASA should throughout provide the board of directors and listeners and members with its assistance and guidance, on the clear understanding that the duties to comply with the provisions of the articles remain squarely on the shoulders of the board of directors. Because the articles are unnecessarily complicated, listeners and members need to be thoroughly and properly informed of their rights, and the Respondent should see to it that all the necessary procedures are properly in place and controlled to avoid mishaps and misunderstandings.

- 27) The articles also provide for “non-voting delegates” to the AGM who are persons “who are not members or (whose) membership (has) lapsed” (article 17.4.2). However, even such non-voting delegates must, in terms of article 17.5 register and forward their names to the Respondent to say that they intend to attend the AGM. Once again, although the articles do not specify any times or methods, we suggest that the same procedures as above should apply to the registration of such non-voting delegates and that they should be informed accordingly.
- 28) Non-voting delegates do not have the right to vote. They may only attend the AGM and have the right to speak but not to nominate directors or to propose any resolution. At the AGM one would have to be careful to disallow “non-voting delegates” from voting but to allow “voting delegates” to vote. How this is to be done in practice need not now be dealt with, as long as the necessary procedures are arranged in this regard. We stress that unless proper procedures are in place and properly applied, great confusion may result from the fact that non-voting delegates have different rights from those of voting delegates. One important procedure would be for the voting and non-voting delegates to be



seated separately from each other and to furnish each delegate with an appropriate sticker to indicate whether he/she may vote or not.

Notice of the procedures and condonation:

29) How and in what detail all the relevant provisions of the articles are to be conveyed to listeners and/or readers of the notice of the AGM, is, of course, a difficult problem in itself. An attempt will be made later in our recommendations to formulate such a notice, but in view of all the difficulties in regard thereto, it must be regarded as a guide only and not as an absolute directive. The same applies to all the suggestions we have made above. It will probably be necessary to stress certain parts of such notice or to add further information during the time leading up to the AGM, depending on problems encountered during the process. If any time periods suggested by us or provided by the articles, are not adhered to, the directors have a discretion to condone such non-compliance providing there is no serious prejudice to the Respondent or any member of the Respondent in doing so. Any listener or member who is late with any step which he/she should have performed, should be informed that the directors may consider granting condonation, thereof, provided that substantial grounds for doing so are put forward by the applicant for condonation in a form which may be obtained at the same places where application forms for membership may be obtained.

Membership categories:

30) Article 7.4 provides for "membership categories". Some of this must be conveyed in the broadcast or written notice. "Individual membership" is open to community members aged 18 years or older who are South African citizens. "Family

membership" covers all members of the family, including children under the age of 18 years. We suggest that, the family concerned would have only one vote. "Community based organisations" such as churches, schools, stokvel societies, would, we suggest, have only one vote per organisation. "Corporate membership" includes a close corporation or private company. Once again, we suggest that each such corporate entity should have only one vote.

#### Election procedure in respect of the board of directors

31) We stress that if the AGM were to take place before the term of office of the existing directors elapses, no directors will be elected at such AGM. If, however, a proposal is timeously made for a resolution to be adopted at the AGM in terms of article 23.1 that the board of directors should "dissolve or cease its function" and it is adopted by 75% of the votes of members present at the meeting, ten directors may be chosen after the adoption of such resolution.

32) If such a proposal is received timeously, the existing board of directors would have to appoint electoral officers in terms of article 8.1 in the event that the proposal were adopted. Such officers should, of course, also be granted the benefit of the guidance and advice of the Broadcasting Compliance Unit. The officers would have to study the articles, as well as the orders of the Authority and this judgment, in order to acquaint themselves fully with their duties.

#### Nominations of directors:

33) Of importance is article 8.2.1 which provides that nominations of directors "shall be forwarded in advance as per notices and or declarations". Unfortunately the article is rather vague. We interpret it as follows:

- (a) In order to nominate a person as a director, the paid-up member nominating him/her, must deliver a written notice to the Secretary of the Respondent in advance of the AGM declaring that he/she nominates such person as a director. The article says nothing about the secondment of such nomination, but in accordance with proper procedure at meetings, we suggest that the nomination should be seconded by another paid-up member of the Respondent.
- (b) Although the article refers to “declarations”, it does not state what the contents of the declarations are. We suggest that one written declaration is that of the proposer who declares under his/her signature that he/she nominates a certain person as a director (see (a) above). We suggest that another declaration should be made by the person who is nominated as a director (the nominee), declaring that if he/she is chosen as a director at the AGM, he/she agrees (under his/her signature) to act faithfully and to the best of his/her ability as a director of the Respondent, that he/she has no criminal record (article 8.2.4) and that he/she is not serving in or holding executive or similar positions in any political party, at any level, or that he/she has resigned from such positions at least three (3) months before the date of such nomination (article 8.2.3). Nomination forms and such declaration forms must also be available at all places where application forms for membership, and other forms relating to the AGM, are available.
- (c) The written notice of nomination and the declaration of the person nominated as director, should, of course, be timeously delivered to the Secretary of the Respondent. The articles do not provide therefor. We



suggest that such nomination forms and declaration must be delivered by hand to the person in control at a place where the forms are available, at least 14 days before the AGM to allow for the printing of the names of nominated persons on ballot papers. The person receiving such nomination and declaration on behalf of the Respondent, must provide the proposer with a document certifying that such documents have been received together with the date on which they was received, including the signature and full names of the receiver.

34) Article 8.2.2 provides for floor nominations of directors, i.e. at the AGM itself but, as we interpret it, requires that a (paid-up) member who is nominated as a director should be "present during the nominations and election, preceded by his/her declaration in terms of provision 8.2.3" that he/she (has) resigned 3 months earlier from executive or similar positions in a political party. We suggest that such declaration should take place on the required form, signed by the nominee and be handed in at the AGM. We suggest that, as noted above, the floor nomination should be seconded by another member who is also present at the AGM. The names of persons nominated by means of floor nominations will have to be added in handwriting on the ballot papers by the voter him-/herself on the instructions of the chairperson.

35) Article 8.2.3 provides that nomination of member(s) who have criminal record(s) shall not be accepted. We have dealt with this above.

36) The provisions of article 8.2.5 are problematical in a case when the board of directors is "dissolved or cease(s) its function" by reason of a resolution of 75% of the votes of members present at the AGM, in terms of article 23.1. If article 8.2.5 were interpreted to mean that, even in such a case, "at least three members of



the current Board of Directors shall be re-elected or retain(ed) to the new Board of Directors", the provisions of article 23.1 would be rendered worthless since it provides that, if such a vote is carried, the existing board of directors "dissolve(s) or cease(s) its function". In other words, the provisions of article 8.2.5 cannot, in our view, apply in such a case. It would only apply to an election of directors, other than an election caused by the board being dissolved or ceasing to function in terms of article 23.1. The result is, in our view, that if the board of directors is dissolved by reason of the adoption of a resolution in terms of article 23.1, none of such directors are automatically re-elected or retained in terms of article 8.2.5. They may, however, be nominated as directors and may again be elected as such.

Voting by secret ballot:

37) Voting for directors at an AGM shall be conducted and done through secret ballot (article 8.3). This means, of course, that if a proposal in terms of article 23.1 is timeously received by the Secretary of the Respondent, whether or not the election takes place before the term of office of the existing directors has expired, ballot papers must be prepared by the Secretary for such secret ballot. Ballot papers must, of course, only be distributed to "voting delegates", i.e. members who are in good standing with their annual membership fees (article 17.4.1). Voters must be instructed on the ballot paper itself and by the chairperson at the AGM to write one of the words "Chairperson", "Deputy-Chairperson", "Secretary", "Deputy Secretary", "Treasurer", "Station Manager" and four "Heads of Sub-committees" behind ten of the names which appear on the ballot paper or have been written thereon at the instruction of the chairperson, thereby voting for ten directors.

Of course, if the AGM is held after the term of office of the existing directors has expired, an election of directors must take place in respect of seven (7) directors because in terms of article 8.2.5 at least 3 (three) members of the current board of directors shall be re-elected or retained to the new board of directors.

38) We have already referred to article 8.5 which provides that only members who have paid-up membership and received invitations to the AGM (see article 18.3), shall have voting rights.

39) Article 8.6 makes it clear, in our view, that the result of the ballot is not necessarily made known at the AGM, otherwise it would have provided that the electoral officers shall at the AGM notify the members elected as directors of their election. The chairperson must announce to the AGM whether or not it is practicable to announce the results of the election at the end of the AGM, or whether it will be announced later. It also appears from article 8.6.1 that the electoral officers must "write to the elected chairperson a list of all elected members with their position and their contact details". This clearly implies that the chairperson of the board of directors and the other directors are elected at the AGM in their respective positions by the members. The ballot paper must, therefore, provide for the voting member to insert the names of the person whom he/she elects behind the designations of chairperson, deputy chairperson, secretary, deputy secretary, treasurer (see article 11.1) i.e. five directors. In terms of article 9.1 the board of directors consists of ten members who shall hold office in the following structures: the Executive Committee (see article 11.1), the Sub-Committees, with the Station Manager as an ex officio member. There are seven Sub-Committees (article 11.5). It follows that the seven Sub-Committees must be distributed among four of the remaining directors. The Station Manager is the tenth director. It is unclear whether the Managing Director (articles 13.1.1

and 13.2) is a director. He is not referred to in article 9.1 as one of the ten directors unless one assumes, which we consider should take place, that the Managing Director is also one of the four directors who is also the head of a Sub-Committee. We suggest that the ballot form should, therefore, make provision for the voting member to indicate the names of the persons whom he/she wishes to elect behind the designations of chairperson, deputy chairperson, secretary, deputy secretary, treasurer, station manager and four other directors who are to be appointed by the directors themselves as heads of Sub-Committees. If a voter votes for more than ten persons, his vote should, in our view, count for the first ten persons for whom he has voted.

40) The electoral officers must safely keep the documents, records and ballot papers in a sealed envelope for a period of 40 days from the date of election (article 8.6.2). We suggest, however, that it should be kept for a minimum period of 3 years, since there may be litigation concerning the voting which took place at such election. Forty days is much too short.

41) Article 8.7 provides that serving members of the board of directors may be re-elected, co-opted as the case may be after his or her term of office has expired. In the event of the board of directors being dissolved or ceasing to function by reason of a resolution in terms of article 23.1 which has been accepted by a 75% vote of members present at a general meeting, article 8.7 presents no difficulty. It would mean, in our view, that serving members of the board of directors which is thus dissolved or ceases to function, may be re-elected after their term of office has expired as a result of such a vote. Similarly, they may be co-opted after their term of office has expired as a result of such a vote. The same applies where the term of office of the directors has expired before the AGM.



Previous history of the articles and lessons to be learnt therefrom:

42) A few words should be said about the previous history of the articles. During the hearing before the CCC it came to our knowledge that on 9 February 2004 the then Monitoring and Compliance Unit (MCU) of ICASA brought a complaint before the then Broadcasting Monitoring Complaints Committee ("BMCC") of which Adv J Broude SC was the chairperson. The present Respondent was also the Respondent in that case. The recommendation of the BMCC was that the MCU and the Respondent would commit to a process in terms of which the Respondent would submit a first draft of the station's new constitution (apparently the articles), whereupon the MCU would comment on the proposed changes. Thereafter the Respondent would circulate the proposed changes to members of the community. After that the Respondent would meet with the ICASA legal team in order to finalise arrangements for the AGM. A date upon which the AGM would take place was stipulated. It would be facilitated by the ICASA legal team. On stipulated later dates the induction process for new board members and the management team would take place, as well as a workshop between the new board members, the management team and the MCU.

It seems that the present articles which were adopted on 26 September 2006 by means of a special resolution of the Respondent were the eventual outcome of the BMCC's order.

Further information of the background of that complaint was unfortunately not furnished to us. Presumably it also flowed from the failure to hold an AGM and from faulty articles. If this is correct, this would be the second occasion upon which the Respondent has been found guilty of material violations of its licence conditions. It is necessary, in our view, that the Respondent should be warned



that where a licensee has repeatedly been found guilty of material violations, the Authority may, in terms of s17E(2)(d)(ii) of the ICASA Act, revoke the licence. It is, therefore, in the community's interest to end the disagreements and fights, otherwise it will probably lose its radio station.

- 43) One is rather shocked to see that the product of the BMCC's order, namely the present articles, are so extremely poor and flawed. Much will have to be done to improve these articles, as well as the processes which are followed to ensure that in general the articles of applicants for licences of community radio stations are up to standard. These articles fall far below standard, in our view, and have probably materially contributed to the disagreements which have taken place. The many problems relating to the articles appear from this judgment. As indicated, there are obscurities and even serious contradictions in the articles. Hopefully, these will all be fully addressed and improved in due course. It seems that the Broadcasting Compliance Unit of ICASA will have to be strengthened by the appointment of persons who not only have legal qualifications, but who have actually practised as attorneys and/or advocates. Otherwise outside attorneys and/or advocates who have the necessary knowledge and experience should be appointed ad hoc to assist in helping the Respondent as well as other community radio stations not only with the proper formulation of their articles of association, but also with legal and factual problems experienced by such stations which lead to the shocking state of affairs such as this. Such appointments would, of course, not eliminate the problems experienced by such stations but would, in our view, greatly assist to alleviate such problems. ICASA, in our view, owes such stations a duty to do so. Of course, the communities concerned must perform their duties properly, but ICASA should give greater guidance and assistance by means of the Broadcasting Compliance Unit, than happened in this case.

The CCC's recommendations to the Authority:

44) We make the following recommendations to the Authority, namely, that the Authority should order the Respondent to desist from any further contraventions of its licence conditions and should immediately take the remedial steps set out below:

- 44.1 by establishing whether the Respondent is financially distressed and whether there is a reasonable prospect of rescuing the Respondent; alternatively whether the Respondent should be placed in liquidation;
- 44.2 by initiating business rescue proceedings, alternatively by placing the Respondent in liquidation;
- 44.3 by accepting the assistance and guidance of the Broadcasting Compliance Unit of ICASA in taking such steps, as well as the further steps outlined below, provided that the board of directors of the Respondent at all times retains full responsibility in respect of all decisions taken by such board in respect thereof;
- 44.4 by establishing whether the existing members of the board of directors of the Respondent were properly elected as directors at the AGM held in October or November 2008 and have therefore been elected for a period of four years from the date of such election, as provided by articles 18.1.5 and 18.1.6 and, if so, all necessary steps must be taken to place the existing board of directors in full control of the Respondent, with the assistance and guidance of the Broadcasting Compliance Unit ICASA;

44.5 if business rescue proceedings have commenced, by deciding within four months thereafter to hold an Annual General Meeting (AGM) and by informing listeners and members of the date of such AGM no less than 3 months before the date of such AGM, by means of regular broadcasts as well as at least twelve (12) printed notices to that effect which should be strategically placed at places within the geographical area to which broadcasts are made. Such notifications should continue regularly until the date of the AGM and should be updated from time to time to provide necessary information to the listeners and members about the AGM and matters pertaining thereto;

44.6 by notifying listeners and members in such broadcasts and notices that in terms of Respondent's articles of association ("articles") only members who have paid-up membership, have received notices of invitation from the Respondent and have registered that they will attend the AGM, will be entitled to vote at such AGM (article 8.5), but that (article 7.4) any listener who is a South African citizen over the age of 18 years, as well as families, which include children under the age of 18 years, community based organisations and corporate entities, may apply for membership of the Respondent on application forms which are available at at least four named places, provided that they commit themselves to the aims and objectives of the Respondent, including its constitutional principles (article 7.12). The completed application forms should be returned to the same place where they were obtained and an annual membership fee of R10,00 must be paid there, for which a receipt will be issued. Applications for membership will be processed by the Respondent upon receipt thereof (article 7.2). An applicant must be notified in writing within 14 days after delivery of the completed application form whether his/her



application has been successful or not. The Secretary of the Respondent must send a notice of invitation to the AGM to all members by post, fax, email or by hand 21 days before the AGM (article 17.3). A member, so invited to the AGM, must thereafter not later than 10 days before the AGM in writing forward his/her name to the Secretary of the Respondent to be registered as a voting delegate otherwise he/she will not qualify as such and may not vote at the AGM (article 17.5). A document proving such registration must be handed to the member by the person in control of such registration at the point where such registration may take place. Persons who are not members or whose membership has lapsed may be allowed to attend the AGM provided that they forward their names in writing to the Secretary to be registered as "non-voting" delegates, not later than 10 (ten) days before the AGM (article 17.5). Such registration will take place at the places where the membership application forms are available. If a member is not up to date with the payment of his/her annual membership fees, he/she should be given written notice at least 60 (sixty) days before the AGM that he/she is not up to date with such payments and should be informed that if he/she does not pay the outstanding amount at least 30 (thirty) days before the AGM, he/she will not be entitled to vote at such AGM and will only be entitled to attend the AGM as a non-voting delegate provided he/she has registered as such at the places where such registration may take place. A document proving such registration must be handed to the member by the person in control of registration at the point where such registration may take place.

- 44.7 by further notifying listeners in such broadcasts and notices that in terms of the Respondent's articles (18.1.5 and 18.1.6 read with 9.1) the existing directors' term of office is four years, which means that the existing



directors will retain their office as directors until about October or November 2012. (This is dependent upon whether the existing directors were indeed elected as such in October or November 2008 which must be factually determined).

44.8 If the AGM is held before October or November 2012, no election of directors will take place unless-

- (a) a written proposal is timeously received from a member who has paid-up membership, seconded by such another member, that the existing board of directors should dissolve or cease its function, and
- (b) seventy-five (75) percent of the paid-up members at the AGM vote in favour of such proposal (article 23.1).

Such proposal must be received by the Secretary at least 30 days before the AGM to enable him/her to send out notices of invitation to the AGM to members 21 days before such meeting (article 17.3) and in order that members may in such notice be informed that such a proposal will be made at the AGM and will be placed on the agenda for the AGM (article 23.1).

44.9 If the AGM is held after the existing directors' term of office has expired, ten new directors may be elected, provided that, in terms of article 8.2.5, three (3) members of the existing board of directors shall be re-elected or retained upon the new board of directors subject to proper nomination as new directors, provided that if 75% of paid-up members at such AGM vote in favour of a proposal then the board of directors dissolves or ceases its

function, ten new directors may be elected without any obligation that three (3) members of the existing board of directors shall be re-elected or retained in the new board of directors;

- 44.10 A written nomination of a person as a director of the board of directors of the Respondent must be signed by a paid-up member as a proposer and another member as seconder and should be forwarded to the Secretary at least 10 days before the AGM (article 8.2.1). Such nomination shall be accompanied by a written declaration of the nominee to the effect that if he/she is chosen as a director, he/she agrees (under his/her signature) to act faithfully and to the best of his/her ability as a director of the Respondent, that he/she has no criminal record and that he/she is not holding executive or similar positions in any political party at any level, or that he/she has resigned from such positions at least three (3) months before the date of such nomination. Nomination and declaration forms will be available at all places where membership application forms, and other forms relating to the AGM, are available. Completed nomination and declaration forms must be delivered by hand to the person in control at the place where such forms are available at least 14 days before the AGM. A director may also be nominated from the floor at the AGM by members proposing and seconding such nomination (article 8.2.2), but in such a case the person nominated as a director must be present during such nomination and election (article 8.2.2) and the nominee's properly completed, written declaration (as aforesaid) shall be handed in from the floor. Members who are serving in or holding executive or similar positions in political parties shall not be eligible for nomination or election, unless they have resigned 3 months before such nomination (article 8.2.3) and their written declarations to that effect are handed in before such nomination (article 8.2.2).

44.11 Voting shall be conducted through secret ballot (article 8.3).

44.12 Serving members of the Board of Directors may be re-elected after their term of office has expired (article 8.7). If ten directors are to be elected, they will be elected to fill the following positions: Chairperson, Deputy Chairperson, Secretary, Deputy Secretary, Treasurer (articles 11 and 18.1.3), four directors as heads of sub-committees (articles 9.2 and 18.1.6) and one as the Station Manager (article 9.3).

44.13 For the sake of clarity it is noted that if no proposal is made for the dissolution of the board of directors, or if 75% of the members present do not vote for such proposal, and the AGM is held before the term of office of the existing directors has expired, no election of directors will take place at the AGM.

44.14 The duties of the AGM shall, amongst others, be-

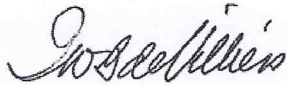
1. to amend and or approve minutes of the previous AGM and special general meetings;
2. to receive, consider and approve the chairperson's report for the years under review, including business rescue proceedings which may have commenced in respect of the Respondent and the prospects of the Respondent in regard thereto;
3. to set out programmes, resolutions and make provision for membership fees for the ensuing year;
4. to elect directors only after expiry of the existing directors term of office, or, if the AGM is held before that time, and a proposal is

adopted by 75% of the votes of the members present that the board of directors should dissolve or cease its function (articles 18.1.5, 18.1.6 and 23.1).

- 44.15 by bringing the essence of above notices to the attention of the listeners and members during broadcasts at least five times per week during peak listening hours, for a period of three months before the AGM is held;
- 44.16 by informing listeners by means of broadcasts and written notices placed at aforementioned strategic places that copies of the articles of association of the Respondent and of this judgment will be made available at a nominal charge of R20,00 each per copy at the offices of the Respondent;
- 44.17 by informing listeners that if any time periods, as set out above, are not adhered to, the directors have a discretion to condone such non-compliance upon written application by the person concerned setting out the reasons for such non-compliance and the nature of such non-compliance, which should be handed to the Secretary not later than ten (10) days before the date of the AGM. The directors must decide such an application for condonation no less than 5 (five) days before the AGM and inform the person concerned in writing of the result of his/her application.
- 45 The Authority should warn the Respondent that where a licensee has repeatedly been found guilty of material violations, the Authority may in terms of s17E(2)(d)(ii) of the ICASA Act, revoke Respondent's licence.



Dated at Betty's Bay this 19<sup>th</sup> day of December 2011.

A handwritten signature in dark ink, appearing to read 'IWB de Villiers', written in a cursive style.

IWB de Villiers

Acting Chairperson of the CCC

The above judgment was agreed to by Ms N Batyi, Ms N Ntanjana, Mr Z Ntukwana,  
Mr J Tlokana and Ms T Ramuedzisi.