

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 5 August 2016

CASE NUMBER 199 /2016

IN RE: MOTHEO FM

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

From Motheo FM: Ms Manko Tsoehlisi (Station Manager) and Mr L Sithole
From Broadcasting Compliance: Ms Fikile Hlongwane (Manager) and with her
Mr T Tleane from Legal
Acting Coordinator: Ms Meera Lalla (Attorney)

JUDGMENT

JCW VAN ROOYEN SC

[1] Motheo FM is a licensed community broadcaster in terms of the Electronic Communications Act 2005 (“ECA”). It operates in Mangaung, Free State Province, and broadcasts more or less within a 120 km radius. Section 56 of the

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.

ECA provides as follows: “A party election broadcast and a political advertisement must not be broadcast on any broadcasting service except during an election period and then only if, and to the extent authorised by the provisions of sections 57 and 58.” The Broadcasting Compliance Unit at ICASA referred the following alleged contraventions of section 56 read with section 58 of the ECA to the Complaints and Compliance Committee. It alleged that Motheo FM on 13 and 14 May 2016, before the election period had commenced, broadcast four political advertisements of the African National Congress, a political party registered with the Electoral Commission.

[2] On the 13th June the Broadcasting Complaints Unit of ICASA informed the radio station of the four broadcasts and that the station had contravened section 56, read with section 58, of the ECA as well as regulation 6(1) of the Regulations on Municipal Elections Broadcasts. On the same day receipt of the email was noted by the manager of the station.

[3] Mr Manko Tsoehlisi, manager of the radio station, sent a letter to the Complaints Unit, dated 17 June 2016. It included the following explanation:

“President Jacob Zuma announced the date of Municipal elections in a statement on the 6th April 2016. The date of the election was announced as the 3rd August 2016.

The Political Parties then issued dates of Manifesto Launches and one was the Free State ANC Manifesto Launch, which was to be held on the 14th May 2016.

The said political party then sourced coverage for the Manifesto Launch from 10 Community Radio Stations in the Free State. The Manifesto Launch was then announced as an event on the radio stations including Motheo FM.

The announcements were done to inform the public of the event as indicated above on the 13th and 14th May.

.....

The Station has contravened the Act not deliberately or due to ignorance, but rather the non-compliance can be associated with the understanding

of the announcement of the Election Date (by the President – 6 April 2016) as opposed to the proclamation (by way of Government Gazette – 23 May 2013) as required by law.

While broadcasters were given a three hour workshop on the regulations and presented with the regulations, it is hardly feasible for a Community Radio Station with no legal departments and units to fully understand and be able to interpret Regulations properly. As the station we would like to be pardoned as this lesson has brought better light in handling matters of regulations.”

[4] In essence the defence of the radio station is that it did not realise that the election period had not commenced after the pronouncement by the President. In effect, they are pleading that they misunderstood the declaration by the President. The ECA defines an election period as follows:

“**election period**” means the period commencing with the date on which the election day is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected;

The election on 3 August 2016 was, in fact, proclaimed in the *Government Gazette* by the Minister of Cooperative Governance and Traditional Affairs, Mr D van Rooyen, on 23 May 2016 after he had signed the notice on 22 May 2016 in terms of the Local Government: Municipal Structures Act 1998. According to the ECA and the regulations it is clear that political advertisements may only have been broadcast as from 23 May – the date of the Proclamation in the Government Gazette – when the election period commenced, coming to an end 48 hours before the commencement of the polling period.

[5]The broadcaster should at least have obtained legal advice as to the effect of the ECA and the Local Government: Municipal Structures Act 1998 on municipal elections. A high standard of compliance is expected from a licensee. It is no excuse that the radio station does not have a legal department or adviser – external legal advice should have been sought and, in any case, ICASA had also arranged for a three hour session, where three representatives of the radio station were present, according to the attendance register. In *S v Waglines Pty*

*Ltd and Another*² Judge Didcott held that “ignorance of or mistake about the law is cognisable by the courts only if that excuse is an acceptable one. The answer would depend on the care he took or did not take to acquaint himself with the true legal position. That person has a duty to acquaint himself with the true legal position, *particularly when he is engaged in a trade, occupation or activity which he knows to be legally regulated.*” To ensure consistency and orderly management within the licensing regime, negligence (*culpa*) would generally suffice. Compare *S v Longdistance Natal Pty Ltd*³ where Nicholson, Acting Judge of Appeal, stated as follows at 284:

“*Mens rea*⁴ in the form of *culpa*⁵ is sufficient for convictions under para (a) or (b) of s 31(1) of the Act. Accused No 4 and the corporate accused were engaged in the specialised field of road transportation, which is strictly controlled by an Act of Parliament and regulations made thereunder. It was plainly their duty to take all reasonable care to acquaint themselves with what they were permitted and what they were not permitted to do. (Cf *S v De Blom* 1977 (3) SA 513 (A) at 532G.)

[6] We have no doubt that not only an intentional violation of section 56 of the ECA (and also the regulation which repeats section 56) could lead to a finding against the broadcaster. As appears from the above dictum in the *Longdistance* matter, negligence would also suffice for a finding against a broadcaster. A reasonable broadcaster in the position of Motheo FM Community Radio should at least have known or have obtained legal advice as to its duties in terms of the applicable legislation.

FINDING

[7] The conclusion is that Motheo FM has contravened section 56 four times by broadcasting election advertisements before the commencement of the election period on 23 May 2016. The station was negligent in not abiding by section 56 of the ECA.

[8] Motheo FM has asked to be pardoned: it does not have a legal department

² 1986(4) SA 1135(N) and regulation of the Standard Terms and Conditions for Individual Electronic Communications Network Service 2010 – both came into operation on 11 September 2011.

³ 1990 (2) SA 277 (A).

⁴ Translated: “a guilty mind”.

⁵ Translated: negligence.

(as a community radio station with limited funds) and has, from the present omission, learnt its lesson. However, political advertisements are unique instruments and it is in the public interest that there should be equal treatment for all political parties. To broadcast such advertisements before the election period affects that principle. In fact, this is quite a serious contravention.

PROPOSED ORDER

[9] As to sanction the usual possibilities as set out in section 17E(2) 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;

Section 56 is, indeed, an instance where no penalty in the form of a fine is prescribed. The CCC, in its advice on sanction to Council, believes that a fine would be appropriate in this instance. It is true that the radio station has a clean record and has pleaded for leniency and even a “pardon”. However, a fine, which need not be high, will send out a message that the contravention was serious.

Having regard to section 17H of the ICASA Act, a wide variety of *maximum* fines are prescribed, ranging from R5 million, R1million to R500 000. Of course, these fines pertain to criminal law and, when one considers the contraventions, prescribed for particularly serious offences. The present contraventions also deal with a serious matter, but given the fact that these contraventions (considered as a group) amount to a first contravention by Motheo FM, it would seem fair to impose a fine of R2000 for the contraventions as a whole. In determining this amount we have considered the latest financial statements (2013-2014 and 2014-2015) of Motheo FM. The station is a typical community broadcaster where funds are not that readily available.

The proposal to Council is accordingly:

1. That Motheo FM Community Radio Station be fined R2000 which amount will be payable to ICASA on or before thirty days after this order is emailed to Motheo FM by the Coordinator of the CCC.

2. Additionally, the station must broadcast **twice** as its **first** item on its **news** service the following statement at a time between 07:00 and 21:00 within seven days of being notified by ICASA of this judgment – such time being notified by email to the Coordinator of the CCC 24 hours before the broadcast.

Inhlangano elawula ezokuxhumana eNingizimu Africa, phecelezi ICASA, ikhiphe isinqumo esigweba lesisiteshi ngokuthi asizange sihambisane nemithetho elawula ukubika ngokhetho. Iphutha lethu kwaba ukusakaza imibiko eqhakamisa amaqembu epolitiki (phecelezi amapolitical adverts) emine ngaphambi kwesikhathi esinqunyiwe ngoba unqongqoshe wayengakalikhphi ngokomthetho usuku lokhetho. Siyaxolisa kakhulu kubalaleli bethu Kanye ne ICASA ngalamaphutha.

[The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Rules. It broadcast on four occasions a political advertisement before the election was announced by the Minister of Cooperative Governance and Traditional Affairs. This station extends its apology to its listeners and ICASA for these contraventions.]

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



JCW VAN ROOYEN SC (Chairperson of the CCC)

10 August 2016

The Members agreed with the finding and proposed order.