

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date heard: **31 OCTOBER 2019**

CASE NR: **342/2019**

PHISIWE CHABA

Complainant

and

MOTHEO FM

Respondent

COMMITTEE:

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

On behalf of the Complainant: Ms. Phisiwe Chaba

On behalf of Motheo FM: Mr. M Monei (Chair of the Board)

From the Coordinator's Office: Ms Meera Lalla (Attorney)

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW van Rooyen

[1] Motheo FM is a class sound broadcasting service, licensed to broadcast to the community of Motheo Municipal District in the Free State Province. Its

¹ 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 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 an order 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.

license was renewed by ICASA as from 12 July 2019.

[2] A complaint was received from a Ms. Chaba, who designated her position as the Chairperson of the Motheo Community Radio Station listeners on 24 February 2019.

As members of the community of Mangaung Metro and greater Motheo District we write this letter to you with heavy hearts and deep concerns. We are proud citizens of this district and we love our community radio station, Motheo FM.

On the 7th of January 2019, the presenters of our beloved radio station Motheo FM went on air to voice their grievances against the station's management. These grievances included mal-administration, mismanagement, allegations of fraud, sexual harassment, nepotism, favouritism and lack of compliance from both management and board as well as unconducive working space (no separate male and female toilets, hazardous studio equipment, no resources for news team, no phones).

This matter was escalated to the board or rather should we say the board only became accessible when the matter went on air. There has been fruitless meetings with the board that clearly made it no secret that the senior manager cannot be suspended nor fired because they do not have performance contract, performance review and policies that employees can use to protect themselves. It became clear that there is a lot of rot at the station because some of our questions were swept under the carpet. There are questionable things from appointment of board members, managers and the way in which presenters are fired.

We are writing to you as ICASA to help us as the community to retain the broadcasting license of the station. We do not want to be another Karabo FM and be shut down, therefore we ask you to help us.

The current board has been co-opted so many times that we have lost count and as regulated by the constitution of Motheo FM that was submitted to ICASA, the board became illegitimate for any operation in 2016 at the AGM (Elective AGM) that was postponed to date. The current structure is a structure that we do not recognise as the community. We do not know who they are, where they come from, who voted them in, who co-opted them and even their roles. Whenever there are vacant positions in the board due to members resigning, the "board" co-opts their trusted friends and never communicate this information to the public. As a matter of fact, there is a member on the board who resigned but she

is still demanding payment for sitting that she is not even a part of.

For over 9 years in existence the station never had a publicly communicated elective AGM. The reason other AGM's fell off is because members of the community questioned and that was said to be disruption. The membership of the station (for voting) is done by the board, therefore they bring in voters that will vote them in so that they can continue toying with our station. We've had enough.

It is a common practice that board vacant positions be advertised and the community must nominate why they want there in the board and that that person must carry particular set of skills or qualifications to voluntarily carry out the said duties. The SABC is doing it, why can't community radio stations do it too?

We humbly request that ICASA help us set up, announce and facilitate an elective AGM because the current state of the station is really a mess. There is an element of sabotage and this is seen with the constant inconsistencies and incompetence that the "board" has shown in the past and present. We as the community of Mangaung Metro and Motheo FM listeners we demand answers through an elective AGM.

Motheo FM Listeners

[3] The Coordinator's Office formalised the Complaint with reference to relevant Regulations. Certain documentation from the Radio Station was also required. It reads as follows:

- 1 We advise that on 7 June 2019, Phisiwe Chaba ("Complainant") referred the aforesaid matter for investigation by the CCC in terms of Section 17B(a) of the ICASA Act.
- 2 The Complainant alleges that Motheo FM has contravened the following 2019 Regulations on Community Broadcasting Services Regulations:
 - 3.1 Governance and Management – Regulation 5(1): *"The Founding documents of an applicant must reflect defined roles of management and the board member."* The Complainant alleges that the roles in Motheo FM's Management and Board are not clearly defined by the appointed persons.
 - 3.2 Regulation 5(3): - *"The Role of the Board includes, but not limited to:*

- (a) *ensuring compliance with all relevant laws, regulations and codes of good practice;*
- (b) *approving policies for the station....”*

The Complainant alleges that there is neither a Code of Conduct nor policies at Motheo FM.

- 3.3 Regulation 5(4)(e): - *“The role of the Station Manager includes, but not limited to instilling discipline through written and approved policies that detail corrective actions and procedures.”* The Complainant alleges that the Station Manager has been firing people with no policies and evicting them, using Court Orders.
- 3.4 Regulation 11: - (1) *A community broadcasting service licensee must, in the event of a surplus, utilise and/or invest the funds in the community served for the purposes of community development.*
 (2) *A community broadcasting service licensee must submit annually, a report with supporting documents, detailing how it has utilised or invested the surplus within the financial year.”* The Complainant alleges that there has been no indication of investments being made for community development. Furthermore, there are no annual submissions of supporting legitimate documents detailing the use of surplus funds.
- 3.5 Community participation Regulation 13 – *“(1) A licensee must ensure that ownership of the community broadcasting licensee remains with the community served.*
 (2) *A licensee must involve the community members in the management of the community broadcasting licensee.*
 (3) *A licensee must establish programming councils/committees to enable community members to participate in the selection and provision of programmes.*
 (4) *The programming councils/committees must be representatives of different interest groups within the community served, such as youth, women, or people with disabilities.*
 (5) *A licensee must submit proof of community participation at every annual general meeting, and other forums that require community participation.”*

The Complainant alleges that Motheo FM:

3.5.1 Changed programs and on-air personalities without having programming councils/committees.

3.5.2 Fails to allow for community participation at AGM's. The community has been communicating with the Board to participate to no avail. A private AGM was held on 20 April 2019, failing to advertise the AGM.

3.5.3 Elected "an illegal Board and interim manager".

[4] The aforementioned allegations of contravention by the Complainant amongst others were fully canvassed in the complaint and annexures thereto. The office of the CCC also noted the complaint lodged by the Complainant on 8 April 2019 with the Consumer and Compliance Affairs Division of ICASA (CCA). The report attached by the Complainant states that meetings were held by the CCA, Board and members of the community on 14 and 15 February 2019 to address the aforementioned issues of governance and community participation.

[5] A number of complaints were also received from employees. Essentially the complaints concern alleged poor management of the station (including alleged dominant management style, low salaries, absence of proper organisational programme guidelines, poor facilities and the like).

REPORT BY ICASA REGIONAL OFFICE BLOEMFONTEIN

[6] The Authority's Bloemfontein Regional Office with the Compliance Officer for the Licensee requested a meeting to be held with the Board of Directors of Motheo FM as well as community and presenters' representatives on 15 and 16 February 2019. The purpose of the meetings was to address the community complaint in relation to the governance structure and the lack of community participation through the Annual General Meetings (AGM). There was a complaint and petition sent to the Authority by community members and presenters of the radio station seeking intervention in order for the radio station to comply with their licence terms and conditions and their founding documents. The meetings were to be held with both parties on the following days:

Day 1: 14 February 2019 with the Board of Directors

The meeting dealt with a brief background on the history of the governance structure of Motheo FM. The Board members reported that they have in the past tried to convene an AGM on several occasions and the AGM's have largely

been unsuccessful due to dispute and disturbance by community members. This led to a court case wherein some community members convened a meeting to elect members of a controlling structure without following proper procedure. Those elected individuals then went and changed signatures at the bank which was later challenged through a legal process by the Board of Directors.

The Board then reports that the ongoing legal matter has been one of the challenges that has led them not to convene an AGM.

The meeting then agreed that there needs to be an action plan to ensure that the radio station is able to convene a properly constituted elective AGM with members. The following important issues were discussed:

1. The radio station's financial year is end of February. The financials that will be presented at the AGM would be for the year ending February 2018. The Board of Directors confirmed that the financials have been audited and will be presented at the AGM.
2. The second issue pertained to membership. The radio station currently does not have membership at the radio station and will commence with a registration of membership week starting 18 February 2019. The Board of Directors reported that the membership forms are ready, and the affiliation amount is R100. The figures were thought to be high based on the living standards and they were requested to go and review the amount payable to ensure that it does not become a prohibiting factor.
3. After the membership is done, there will be a process of auditing the final figures of the registered membership which will make voters roll. There will be a process to appoint a company and/or representative to facilitate the elections. Nomination form and process to be on the Board of Directors will be in accordance with the founding documents.
4. The process for membership and nomination will be communicated through the radio station and any other medium accessible by community members; and the AGM will be held on or no later than the 13th of April 2019.
5. The Board of Directors has promised to submit a comprehensive Plan of Action with timelines and deliverables by Tuesday, 19 February 2019. There will also be weekly updates on the Plan of Action accordingly to address any challenges that may arise. The radio station through the presenters and management will have to come on board and allow the discussion and

facilitation of spreading and educating the listeners.

As a result of problematic weather, only one of the presenters could meet with the Bloemfontein Office. He was informed about the meeting which took place with the Board the previous day. Operational issues were not discussed – leaving that for a further meeting with the employees. There was consensus that the presenters had to act professionally and refrain from making bad remarks or defamatory statements about Board Members so as to ensure that the AGM is a success. The accent was on the necessity for the Board and employees to work together. Membership should be promoted and adverts should be promoted.

RESPONSE TO THE COMPLAINT

BACKGROUND

[7] Motheo Multimedia Institute is a legal entity and it is governed by a Constitution and has membership according to its founding documents. During the application process of the license, Motheo Multimedia submitted the following documents to ICASA: Founding documents, Constitution, Business Plan, Financial Projection, Human Resources / Operational Policies.

These policies have been operational and are in use at the station.

1. There has been various attempts by disgruntled former presenters to unseat the Board. This was noted when an illegal AGM was convened and illegitimate Board members who fraudulently changed the signatories at the Bank. *The unfortunate situation was then challenged at the Court and a ruling was given in favour of Motheo FM and Motheo Multimedia Institute* (accent added by CCC). However the group then opted to appeal the ruling which dragged and prevented the Board from holding any AGM pending the appeal.

2. It must also be mentioned that various attempts to hold AGM's were made and they were disrupted. Mr Maano Dzebu and Mr Molutsi ICASA Bloemfontein convened meetings with concerned groups that are not holding any membership of Motheo Multimedia Institute. Despite all that important disregard of the Constitution aspect, the Board continued to participate.

3. It must be mentioned that some of the signatories of the petition are presenters that we took to court to obtain a restraining order for abusing airtime during their programs. The complainant and listeners used airtime given by the

presenters (...) ² to attack the Board and the Management. The communications leading to the convening of the AGM was entered into with the Compliance officer, Mr Maano Dzebu. The AGM report attached hereto was submitted to the office of Mr Maano Dzebu on the 3rd of May 2019 outcome of the AGM letter to ICASA.

4. Motheo FM is a legal institution and registered as a non-profit organisation and Legal Board members are listed on the founding documents referred to in Annexure B14, Pack 2. Management appointment is done according to organogram of the station - refer to contracts of the management annexure. Contract of all appointed management is attached. The station manager resigned at the end of March 2019 after the presenters prevented her from performing her responsibilities. She was given special leave after the presenters put a key block on her office door to prevent her to access her office. The signatories who are presenters (...) ³ to the petition also formed part of the unruly behaviour and restraining order was sought against them The Board has always been consistent with protection of Motheo FM and this was seen during the fraudulent AGM convened and hijacked bank accounts of Motheo FM. Refer to judgment Annexed to Papers. Copy of policies existed before Motheo FM went on air and should be in the file of Motheo FM at ICASA's archives. Motheo FM policies were reviewed and signed off by the Board on 01-05 October 2018. It must be noted that complaints were received during the meeting between the Board and the Presenters were not happy with the treatment they received from the former station manager who resigned in March 2019 as discussed under the background. The Board requested that each presenter should submit grievance in writing to support their complaints for investigation. However the Board appointed an independent person to investigate the complaints. It was difficult to deal with those complaints because no one cooperated. Despite intervention of the Board, the presenters proceeded to abuse airtime of the station to attack the management and the Board. That behaviour compromised advertising and listenership, especially those who don't have interest to internal matters being discussed on the Radio. There was a move to bring instability by the presenters whom [the] court order was sought [against]. They failed to defend the matter

² Names removed by Chair of the CCC for the sake of privacy. See section 4C(5) of the ICASA Act read with section 17C(6) of the ICASA Act.

³ See previous footnote.

after indicating their intention to do so. It must be mentioned that the financial situation, due to the current economic status has been so bad that there hasn't been any surplus declared. These documents were submitted as required to ICASA annually. Refer to 2 circles of annual financial statements attached. Motheo FM is a community Radio Station and its membership is paid up and those members participated in the AGM held on 20 April 2019. Refer to membership list, membership forms and attendance register for the AGM. Programming committees couldn't continue due to disruption of the AGM's and pending court cases until late 2018. It was resolved that the AGM has to precede any other plan of the Board. Appointment of presenters is the prerogative of the Programs Manager and the station manager, however the situation with regard to committees has been discussed. The AGM was conducted according to the guidelines supplied by ICASA. Members in good standing participated and elected the Board on 20 April 2019. The acting station manager was appointed by the Board and it must be mentioned that he is a volunteer presenter who has been in the station from 2009.

It is unfortunate that an ill-informed listener, who has a conflict of interest because her daughter is a volunteer, blew the situation out of proportion. She is not a member and all other complainants. We at Motheo FM take concerns of our listeners seriously and we appreciate those who do it legitimately. The document submitted with this report will clearly outline the sequence of events at Motheo FM. ICASA Compliance officer is in possession of all the correspondence sent to him.

We believe in clean governance and our documents will give testimony to our visions and mission. Our constitution does not recognise the committee that is led by the complainant.

M Monei: Chairperson (18.07.2019)

CONCLUSION

[8] The CCC has noted the management problems at the Station, as complained about by the Complainants. It is not the task of the CCC to resolve internal management problems. The Board and Station Manager must look into that. The jurisdiction of the CCC essentially deals with matters such as whether the ECA, ICASA Act, Regulations and licence conditions have been abided by or whether the Board was validly elected. The contents of broadcasts are also

subject to the Broadcasting Code and when complaints in terms thereof are received, the complaints are dealt with, unless the BCCSA⁴ has jurisdiction. *It is also to be noted that the license was renewed by ICASA in 2019.*

[9] The radio station was initially set up as a so-called section 21 Company. That means that profits had to be ploughed back into the radio station and not be divided between members, as is the case with a public company. To be a full member of the radio station, according to the Constitution of the Radio Station, the person must be a subscriber to the Memorandum and fully paid up as to membership fees. All applications for membership are subject to the conditions as prescribed by the Board of Directors from time to time. Annual subscription fees must be paid – the amount of which is from time to time determined by the Board. The Board will have the discretion to charge no subscription at all or to exempt a particular class of members or to charge different subscription fees for different classes of members.

[10] With the amendment of the Companies Act in 2008, the existence of a so-called section 21 company was no longer possible. All section 21 Companies became Non Profit Organisations. The licensee noted this amendment with the Companies and Intellectual Property Commission on 22 April 2014. Forthwith it would be Motheo FM NPO.

[11] The Company has 20 members. 17 Members were present at the 2019 AGM. It is clear that the members were notified of the meeting, since a few were recorded as having notified that they were unable to be present. We accept the allegation that the AGM was not advertised on the radio. But that is not required by the Constitution of the Radio Station. Two small advertisements of the meeting in Afrikaans newspapers were published. Seven notices were posted on spots to which the public would generally have access. Members of the (local) public were invited to attend the meeting and join as members. Although the expectation was and is that the community should become voting members of the radio station, this has not happened – except for the number referred to. This probably has to do with the unhappiness with the Board which the Complainant alleged. A Financial Statement for the year ending 2018 was accepted at the AGM. Similarly, a financial statement for the half of the preceding year was also placed before the meeting. The Annual Financial Statement for the year ended 28 February 2015 was also made available to the

⁴ See section 54(3) of the ECA.

CCC. Accountants confirmed the Statements and stated that they had acted in conformity with what is expected from them in terms of the Non Profit Organisations Act 1997.⁵ The election at the AGM was declared fair and free by an Accountant appointed by MET Facilitators. Thus, although the ideal is that the listening public should join an AGM in large numbers, this has simply not happened. The fact that the AGM was not held at a place which was readily accessible - outside Bloemfontein, but within the broadcasting range - was discussed with the Respondent's Representative at the hearing of this matter. However, given the more than 90% attendance of the meeting by fully paid-up members, this would not have seemed to be the main problem. Of course there were only 17 members, out of the 20, present. The complainants regard the Board as illegitimately elected and the radio station as being run in a highly questionable manner. *However, according to company law, a valid meeting was held and Annual Financial Statements as approved by Accountants were accepted. The election of the Board was also declared to be valid by an independent professional. The term of the Board is two years and, thus, in 2021 an election will be held again.*

[12] Despite the validity of this 2019 meeting in terms of company law, it is clear that there is substantial unhappiness, as gleaned from the complaint and listeners present at the hearing, with the management of the station. The contact with the community by way of meetings has been non-existent, despite the Electronic Communications Act⁶ and Regulations which require the opposite. *This is a crucial matter, and we will now deal with this omission. Regulation 13 of the 2019 Community Broadcasting Regulations 2019 provides as follows:*

13. Community participation

(1) A licensee must ensure that ownership of the community broadcasting licensee remains with the community served.

⁵ There is no requirement in the legislation that financial statements of a community broadcaster must be confirmed by an auditor. It is, however, noted that the Constitution of the Station requires confirmation by an auditor. This was, however, not part of the complaint. Of course, the CCC may, where relevant, require such confirmation. The inquisitorial powers of the CCC must, however, be applied in a fair manner – see *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at para [60] and since this aspect was not raised by the complainant, we shall not deal with it further.

⁶ Section 50.

- (2) A licensee must involve the community members in the management of the community broadcasting licensee.
- (3) A licensee must establish programming councils/committees to enable community members to participate in the selection and provision of programmes.
- (4) The programming councils/committees must be representative of different interest groups within the community served, such as youth, women, or people with disabilities.
- (5) A licensee must submit proof of community participation at every annual general meeting, and other forums that require community participation.

Section 50 of the ECA, insofar as it is relevant, provides as follows:

50. Community broadcasting service licences

In considering the grant of a new community broadcasting service licence the Authority must, with due regard to the objects and principles enunciated in section 2, among others, take into account whether -

- (a) ...
- (b) the applicant intends to serve the interests of the relevant community;
- (c) as regards the provision of the proposed broadcasting service, the applicant has the support of the relevant community or of those associated with or promoting the interests of such community, which support must be measured according to such criteria as may be prescribed;
- (d) the applicant intends to encourage members of the relevant community or those associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and
- (e)

[13] From the above it is clear that whatever the expectations of parts of the broad community are, the Board has, insofar as its 2019 meeting is concerned, acted within what is expected from a Non-Profit Organisation. ICASA also renewed its licence in 2019. The Constitution of the licensee requires that only persons who are paid-up members may vote. Patrons are exempted from paying membership fees. The financial statements, confirmed by accountants, which were filed, also demonstrate that the Board is aware of its duties from a financial perspective. Advertisements of the AGM are also not required to be on air in terms of the Constitution of the licensee. There were advertisements of the 2019 AGM placed at strategic places to which the public has access.

[14] *There is, however, a substantial problem in the relationship with the community or, at least, according to the views expressed by the Complainant and supporters at the CCC hearing.* There was no evidence of meetings with the community and the CCC will advise the Council of ICASA to order the Board to ensure that this must take place on an organised basis and also in a satisfactory manner. In other words, properly advertised on air, at readily accessible places and duly recorded with report back meetings. Plus a Report and Invitation to the ICASA Regional Office.

FINDING BY THE CCC

The finding on the facts is as follows:

- 1. The AGM held in 2019 was valid. The Constitution does not require that the meeting be advertised in any manner. Notice to the fully paid-up members is sufficient. There was, in any case, notices placed in strategic places in Bloemfontein. Two rather small ads were placed in Afrikaans newspapers. Had an advertisement in a newspaper or newspapers been required by the Constitution, the said notices would not have been valid. The core of the matter is that the licensee is structured as a NPO and it has a detailed Constitution, which must, clearly, have been professionally written. There are specific rules as to who may vote – only fully paid-up members may vote.**
- 2. Financial Statements confirmed by Accountants, within the ambit of their function, were also filed at the AGM as indicated above. There is no requirement in the Legislation that Auditors must approve the financial statements. Of course, such statements may be required by the CCC where it is necessary to establish a fact.**
- 3. The licence of the radio station was also renewed in 2019 and the amendment to a NPO was effected in 2014 with the CIPC.**
- 4. In so far as it is claimed that the licensee has not made its financial surplus available to the community, as required by the Regulations, there was no evidence of any surplus. *Surplus* is not equal to a credit balance in the Bank or elsewhere. It would only be present where substantial profit has been made and it can be shown by a Complainant that the Balance Sheet shows investments, which are not bona fide intended for upgraded radio service. What “surplus” means, would**

depend on the circumstances. The CCC's experience with community radio stations is that in quite a number of cases there is a financial struggle to stay on air. It would, in fact, be surprising if there is any surplus, given the drop of listeners in the case of Motheo. The Financial Statements also do not support a finding of excess.

5. One area where there is an omission relates to consultation with listener committees, in regard to which an order will be advised to Council.
6. Although it was stated above that management and relationship issues of the Staff does not fall under the CCC's jurisdiction, the CCC must express its concern in the light of statements by staff relating to victimisation, poor salaries and old equipment.

ADVICE TO COUNCIL OF ICASA AS TO AN ORDER

1. That at least three members of the Board and the Station Manager be directed to hold at least two meetings with three geographic sectors of the community per year, including 2020, on a Saturday afternoon, with daily notices of the meeting on the radio between 07:00 and 08:00 for at least ten days: the first meetings to be held before the end of June 2020 to determine problems the community experience with the broadcasts of the station and proposals as to what should be broadcast.
2. That the matters be considered at Board level and that Report back meetings be held before the end of October 2020; once again on a Saturday afternoon with daily radio notices of the meeting between 07:00 and 08:00 for at least ten days.
3. That a full report in this regard be filed with the Regional Office of ICASA before the end of November 2020.
4. That similar future Annual Meetings be held with the same communities with due notice and dates as set out above. Once again with Report back to the Regional Office of ICASA.

J. C. W. van Rooyen

JCW VAN ROOYEN SC
The Members Agreed

28 January 2020