COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 24 November 2016 **CASE NUMBER 205 /2016**

IN RE: NKOMAZI FM

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

On behalf of Nkomazi FM: Attorney H Marais, Malalane; From Customer Complaints and Dispute Resolution: Ms Susan Mashinini;
Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] Nkomazi FM is a community broadcaster in terms of the Electronic Communications Act 2005 ("ECA"). It broadcasts, especially, in Si Swati and is based in Malalane.[2]

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[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.

[2] Malalane (formerly Malelane) is a farming town in the Province of Mpumalanga, situated on the N4 highway. The farms in the region produce sugarcane, subtropical fruit and winter vegetables.

[2] As a result of a broadcast by Nkomazi FM on 12 January 2016, which allegedly amounted to hate speech against a fruit producing business in the district, the said business filed a complaint with ICASA, dated 27 January 2016. There were also references to previous broadcasts which were, allegedly, defamatory of the complainant's business. Since the complaint of defamation and hate speech is not before the CCC, it is not necessary to identify the business which is, in any case, known to Nkomazi FM.

[3] The Consumer and Compliance Affairs Division of ICASA required a copy of the broadcast from the manager of the radio station on the 4th February 2016. On 24 February a reminder was sent to the manager and the next day telephonic contact was made. Having not received an answer from the station manager, an email was sent to the manager on the 8th March 2016.

[4] On the 10th March a response was received via the radio station's attorney, Mr Marais. He stated that a recording was not available since the station had moved studios and had been using temporary studios. As a result of this move, the recording machinery had not been set up yet. The station was, in any case, unaware of a broadcast which referred to the business that complained to ICASA. The radio station would, however, "gladly" assist with the complaint.

[5] On the 14th March the Consumer and Compliance Affairs Division communicated telephonically with the attorney. Reminder emails were sent to the attorney. On 3 May a further email was sent to the station manager informing him that by not having made a copy of the broadcast the radio station was in contravention of section 53(1)(a) of the Electronic Communications Act as well as Regulation 9(1)(a-d) of the Amended Standard Terms and Conditions for Class Broadcasting Services of 30 March 2016.

[6] The Regulations 9(1)(a-d) provide as follows:

9.Provision of information

(1)The Authority may, in the course of carrying out its obligations under the Act, require a Licensee to provide any information including documents or books not ordinarily required, so as to enable it to:(a) monitor and enforce consumer protection, quality of service, competition, compliance with licence conditions and other requirements of the Act and related legislation;(b) allow for the assessment and allocation of applicable fees and related requirements;(c) facilitate the efficient use of radio frequency spectrum; and (d) collect and

compile information to be used for research purposes, planning, reporting and conducting inquiries.

This regulation, with respect, does not include the duty to make copies of broadcasts. it cannot be accommodated under "information", especially in the light of the reference to " documents and books". The word "information" must, in accordance with the rules of statutory interpretation, be interpreted in terms of the "cognoscitur a sociis" or "eiusdem generis" rule, which means that the word "information" must be understood within the context of "documents and books" – and a copy of a broadcast would not, in the ordinary course, be understood to be included in the category of " documents and books".[3] In any case, section 53(1) of the Electronic Communications Act 2005, which directly deals with recording, has been in operation since July 2006. The contravention of this subsection was, in any case, also added, as a first alternative, to the charge before us by the said Division. It provides as follows:

53. Record of programmes broadcast by broadcasting service licensees

(1) A broadcasting service licensee must -

(a) on demand by the Authority, produce to the Authority any recording of every programme broadcast in the course of his or her broadcasting service for examination or reproduction, within 60 days from the date of broadcast;

(b) on demand of the Complaints and Compliance Committee, produce to the Complaints and Compliance Committee any script or transcript of a programme after the broadcast of the programme.

MERITS OF THE ALLEGED CONTRAVENTION

[7] The Consumer and Compliance Affairs Division argued that the CCC should make a finding against the Radio station and recommend that Council impose a desist order in terms of section 17E(2)(a) of the ICASA Act and, additionally, impose a fine.

[8] The defence set out in paragraph [4] above could amount to a defence of impossibility of performance, which is a defence in our law.[4] Compare the

[3] See *Bertie van Zyl (Pty) Ltd v Minister for Safety & Security* 2010 (2) SA 181 (CC) para 44 per Mokgoro J, with whom the majority of Justices concurred. This is, in any case, well known rule of interpretation, supported by a long line of authorities.

[4] Compare the CCC judgment in *Nowmedia v SAPO* (Case 126/2015).

incisive analysis of impossibility as a defence by Judge Van Zyl in *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C). The learned Judge, inter alia, stated as follows:

In criminal law the maxim *lex non cogit ad impossibilia rather* than *impossibilium nulla obligatio est* has featured prominently. It has usually occurred where an Act of Parliament or similar statutory enactment has demanded compliance, under appropriate circumstances, with an obligation or some other form of positive conduct. If such obligations or conduct should be objectively impossible and not have been caused by the person pleading impossibility, the maxim may be applicable.

This has been the approach in a number of South African cases. See R v Mostert 1915 CPD 266 (impossible to give a stamped receipt in terms of s 18(3)(b) of Act 30 of 1911); R v De Jager 1917 CPD 558 (impossible to procure a taximeter as required by reg 706 of the Cape Town Municipal Regulations framed under Ordinance 10 of 1912); R v Harris 1919 CPD 216 (impossible to obtain a hydrometer for establishing whether water has been added to brandy in contravention of s 8 of Act 15 of 1913); Jetha v Rex 1929 NPD 91 (impossible to attend a meeting of creditors in terms of s 142(a) of Act 32 of 1916); S v Mafu 1966 (2) SA 240 (E) (impossible to comply with curfew regulations contained in Proclamation 194 of 1934); S v Moeng 1977 (3) SA 986 (O) (impossible to obtain a 'passbook' in accordance with s 15(1)(a)(i) and (ii) of Act 67 of 1952 as amended)...

In a number of other cases the maxim was considered, expressly or by implication, but held not to be applicable. See R v Close Settlement Corporation Ltd 1922 AD 294; R v Korsten 1927 NPD 12; Attorney-General v Grieve 1934 CPD 187; R v Hoko 1941 SR 211; R v Hargovan and Another 1948 (1) SA 764 (A); R v Adcock 1948 (2) SA 818 (C); R v Canestra 1951 (2) SA 317 (A); S v Block 1967 (4) SA 313 (C); S v Leeuw 1975 (1) SA 439 (O); S v Concalves 1975 (2) SA 51 (T)...

'Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, Lex non cogit ad impossibilia, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse.'

[9] From the above analysis of the law and from further case law quoted by Judge Van Zyl it is clear that full details must be provided of the facts on which the alleged impossibility is based. There was no one from the radio station management at the hearing. Details were, accordingly not provided - also not in the written communications from the attorney. For such a defence to succeed, much more detail as to the circumstances would have been necessary. On a

close analysis of the case law, we have thus come to the conclusion that the defence of impossibility would not fit these facts.

[10]The second question is, however, whether there was negligence on the side of Nkomazi FM. This is so since, even if there had objectively been a contravention of the said regulation, the legal question remains whether the radio station had been negligent. This legally *implied* requirement of negligence is discussed in the following paragraph.

[11] The approach was described as follows in *S v Arenstein*:[5]

The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (*R v H* 1944 AD 121 at 125, 126; *R v Wallendorf and Others* 1920 AD 383 at 394.) Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (R v H (supra at 126).)' [6]

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP:* [7]

[86] The general rule of our common law is that criminal liability does not attach if there is no fault or blameworthy state of mind. This is expressed by the maxim: *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is a guilty mind). The fault element may take the form of either intention or negligence. This is true of both common law and statutory offences. (Footnotes omitted)

Also Justice Cameron (with whom four other Justices of the Constitutional Court concurred) stated as follows in *Democratic Alliance v African National Congress:*

[154] a further issue needs to be addressed. This also follows from the ground rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted 'false information'. This means that, in law, the author acted innocently. And the requirement of a guilty mind 'is not an incidental aspect of our law relating to crime and punishment, it lies at its heart'. *Strict criminal liability is therefore not easily countenanced. There is thus an interpretative*

[5] 1964 (1) SA 361 (A) at 365C-D.
[6] See further *S v Qumbella* 1966 (4) SA 356 (A) at 364D-G; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H-611A; *S v De Blom* 1977 (3) SA 513 (A) at 532B-D.

[7] 2014 (5) SA 317 (CC).

presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are 'clear and convincing indications to the contrary.[8] (Emphasis added and footnotes omitted)

[12] There are no indications, as set out above, than an innocent violation of section 53(1) would also amount to a contravention in law. Ultimately, the question is, accordingly, whether the radio station was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case, a member of the management or the relevant presenter, *should* have known that a recording was not being made.

[13] That the particular circumstances of each case must be considered in establishing whether there had been negligence has, once again, recently been applied by our Constitutional Court and by the Supreme Court of Appeal in two matters. In the one instance[9] negligence was found to have been established and in the other instance that it was not established.[10]

FINDING

[14] Once again, the absence of any evidence at the hearing by the management, makes it impossible for the CCC to make a finding that there was no negligence. Recording of broadcasts is an important duty of each broadcaster – it is even set out in the Act itself. On the facts before the CCC the conclusion is, accordingly, that the reasonable broadcaster would have taken steps to ensure recording, even under the circumstances sketched. Negligence is, accordingly found to have been present.

[15] It should be mentioned that the radio station was requested at the hearing to submit full details setting out all the circumstances that led to the difficulties with the recording. In an affidavit signed on the date which the CCC set for the affidavit, it was confirmed under oath that no recording was made as a result of the circumstances which were referred to by Mr Marais. Since this affidavit was addressed to ICASA, it only reached the CCC coordinator on the 6th January 2017. We will not hold this against the Respondent and accept that the affidavit was, indeed, signed, before a Commissioner of Oath on the 15th December. However,

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[8] 2015(2) SA 232(CC).

[9] *Lourens & Others v Imvula Quality Protection (Pty) Ltd* 2014(3) SA 83(CC) per van der Westhuizen J, writing for an unanimous Court; also compare *Oppelt v Depatment of Health, Western Cape* 2016(1) SA 325(CC).

[10] *Buthelezi v Ndaba* 2013(5) SA 437(SCA) per Brand JA, writing for an unanimous Court.

the affidavit did not add much to what attorney Marais stated in argument at the hearing.

[16] The result of our inquiry into the matter is that the radio station had been negligent in not having assured that its recording equipment was operational at the time of the broadcast which, allegedly, contained hate speech. Whether it was hate speech is irrelevant. What is relevant is the fact that there was no recording made. Furthermore, no evidence was placed before us by the radio station to counter the *prima facie* inference of negligence. It might have assisted – and, in any case, promoted the standing of the radio station management- had it attended the hearing. But, regrettably, the CCC hearing was not attended by any member of the management.

SANCTION

[17] The imposition of a fine would, indeed, be appropriate in the circumstances of this case. Firstly, no one from the radio station was present at the hearing – the staff who had come to Johannesburg having made a visit to the SABC during that morning. Although Mr Marais informed us that the station was well run, the CCC found it quite extraordinary that it was left without the benefit of any evidence from the management of the station. The attorney did represent the station but, as an attorney, he could not also testify. In any case, although the attorney, Mr Marais, informed us that he also presented a regular programme on the station and that his experience was that the station was generally managed well, he could most certainly not give first hand evidence as to what had, indeed, taken place as to the omission to record. In any case, a vague reference in the correspondence to a move to new studios would simply not suffice. Even the affidavit filed after the hearing provided no assistance as to detail.

[18] Section 56 of the ECA does not explicitly prescribe a fine. The sanction section 17E(2) of the ICASA Act must, however, 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;

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. Section 17E(2) of the ICASA Act deals with regulatory contraventions and do not amount to offences in criminal law.

Nevertheless, the fine in the present case must send out a message that no inquiry can be lodged into whether a broadcast had contravened the Broadcasting Code or a section of the ECA without the recorded evidence of the broadcast referred to in the complaint. Furthermore, that a case such as the present one can hardly be decided without staff of the station giving evidence. I considered whether I should not order the station manager to appear before the CCC in terms of section 4C read with section 17C(6) of the ICASA Act, but decided against it. It was unlikely that any more facts would have come to light. In any case, the management had the opportunity to make themselves available at the hearing – they were in Johannesburg paying a visit to the SABC – and omitted to attend the hearing. A further opportunity was given to submit an affidavit outlining the facts. This was done, but did not assist the CCC at all as to details.

[19] We accordingly advise Council as follows as to an appropriate order:

1. That the radio station, in terms of section 17E(2)(a) of the ICASA Act, be ordered to desist from a future omission to record a broadcast and keep it for 60 days as provided by section 53(1) of the ECA.

2. That a fine of R15000 be imposed on the station, payable within a period of three months, the period running from the end of the month that the judgment is published by the Council of ICASA through the Coordinator of the CCC.

3. Council is advised in terms of section 17B(b) of the ICASA Act to consider directing the Senior Management of the Consumer and Compliance Affairs Division to meet with the Manager of the radio station at the offices of ICASA and discuss the radio station's alleged laxity in its reporting relationship with the Consumer and Compliance Affairs Division. Such a meeting must, if supported

by Council, take place within 30 days from when this judgment is published. The outcome of the meeting must be filed with the CCC Co-ordinator.

JCW van Rooyen SC 4 February 2017
Chairperson of the CCC.

The Members agreed with the judgment.