

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

Date of Hearing 26 July: 2018

Case Number: 292 /2018

**DIRENG INVESTMENT HOLDINGS (PTY) LTD**

**COMPLAINANT**

**V**

**NORTH WEST FM(Pty) Ltd**

**FIRST RESPONDENT**

**21<sup>ST</sup> VENTURE CAPITAL(PTY) Ltd**

**SECOND RESPONDENT**

**TRUSTEES OF THE KHETANI TRUST**

**THIRD RESPONDENT**

**SADTU INVESTMENT HOLDINGS**

**FOURTH RESPONDENT**

**MOTSWERE TRADING (PTY) LTD**

**FIFTH RESPONDENT**

**ACTING STATION MANAGER OF NORTH WEST FM**

**SIXTH RESPONDENT**

COMMITTEE Prof Kobus van Rooyen SC (Chairperson)  
Dr Keabetswe Modimoeng (ICASA Councillor)  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Mr Jacob Medupe  
Mr Jack Tlokana

Mr K Setzen (shareholder) on behalf of the Complainant

For the Respondent: Mr L Pierce from Phukubje Pierce Masithela Attorneys  
Parktown

Acting Coordinator: Ms Meera Lalla (Attorney)

Coordinator Ms Lindisa Mabulu

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<sup>1</sup> An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it or filed with 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 on complaints from outside ICASA against licensees. Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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. Where a complaint is not upheld, the matter is also referred to Council.

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## JUDGMENT

### JCW VAN ROOYEN SC

#### INTRODUCTION

[1] North West FM (Pty) Ltd is a broadcaster which is licensed by the Independent Communications Authority of South Africa (“ICASA”). Its Board of Directors consists of all the shareholders who may each appoint an alternate director to represent them. The Complainant in this matter was the Chairperson of the Board until 22 February 2018. He, of course, remained a director, with the right to vote his Company’s shares, which comprise 26% of the shares.

[2] It should be mentioned that the shareholders set out above were included as respondents by Mr Setzin, since they are financially interested parties. However, Northwest FM, as licensee, is the only respondent in this matter, since the complaint is directed at it. The CCC has been recognised by the Constitutional Court as an independent administrative tribunal in terms of section 33 of the Constitution of the RSA. Its task, in a matter such as the present, is to decide, in accordance with section 17D of the ICASA Act 2000 whether there are merits in a complaint and, if so, uphold the complaint. It then has the duty to recommend to the Council of ICASA an order or orders to be issued within the ambit of section 17E(2) of the ICASA Act.

[3] Under the Chairmanship of Mr Setzin the Board had in June 2017 resolved unanimously to sell 50% of the shareholding to Motswako Media Group (Pty)Ltd (“Motswako”). This would reduce the shares of the shareholding companies. The aim was to strengthen the financial position of North West FM. Later on it was realised that ICASA had to be approached to assent to the transaction and that the licence, if so approved, would have to be amended by ICASA to include the new shareholder and its shareholding. For this purpose a form G had to be filed with ICASA. This has been done and ICASA has on 8 June 2018, published a Notice in the *Government Gazette* calling for representations in regard to the amendment of ownership. These representations had to be lodged with ICASA within 14 working days after 8 June 2018 – the date on which the Notice was published in the *Gazette*.

[4] Mr Setzin alleges in the complaint that, effectively, the control of North West FM has been taken over by Motswako before the authorisation of the contract

by ICASA. He, accordingly, filed the following complaint which was, according to a directive by the undersigned, replaced on an urgent basis by a supporting affidavit. North West was required to file an answering affidavit, whereupon Mr Setzin filed a replying affidavit.

## **COMPLAINT**

[5] For purposes of this judgment we will make use of the initial complaint which was filed. The founding affidavit substantially repeats the complaint.

**The Complaint reads as follows: [Paragraph numbers added for ease of reference by the undersigned]**

*Irregular Board Changes at North West FM (NWFM) and Circumvention of ICASA Regulation in Respect of Shareholder Changes and Management Control*

*(1)By way of background, Direng Investment Holding (Pty) Ltd, a 26 % shareholder of North West FM (NWFM), represented by Mr Kenny Setzin, who is the founding shareholder and a Non-Executive Chairman of the board formally lodges a complaint against Motswako Media Group (Pty) Ltd (Motswako) and the station's non-executive director who are colluding to take-over North West FM (NWFM) unlawfully without following ICASA's regulatory processes.*

*(2)The share register at ICASA should reflect NWFM shareholding as follows:*

- 1) Direng Investment Holdings (Pty) Ltd (DIH group)- 26%*
- 2) Sadtu Investment Holdings (Pty) Ltd -24%*
- 3) Motswere Trading ( Pty) Ltd- 20%*
- 4) 21<sup>st</sup> Venture Capital- 20% -foreign owned entity.*
- 5) Khethani Trust- 10%*

*(3)The problem started when 21<sup>st</sup> Venture Capital together with Khethani Trust expressed a desire to sell their shareholding and Motswako offered to buy their stake, which would result in Motswako owning 50% of the station.*

*(4)The board representatives at NWFM after the amendment to the Shareholders' Agreement, which allowed shareholders a board seat for every 10% shareholding (shareholding in brackets) are as follows:*

- 1) Kenny Setzin- DIH group – Non- Executive Director/Chairperson(26%)*

- 2) Pearl Sokhulu- 21<sup>st</sup> Venture Capital – Non- Executive Director(20%)
- 3) John-Nassel Henderson – Khethani Trust- Non-Executive Director(10%)
- 4) Simon Ramodike- Motsware Trading- Non Executive Director(20%)
- 5) Thami Nompula -Sadtu Investment Holdings – Non-Executive Director;  
and Mashilo Matsetela has been attending meeting without a formal  
letter from Sadtu Investment appointing him to the board (24%)
- 6) Svein Larsen – 21<sup>st</sup> Venture Capital - Non-Executive Director; and Rune  
Remoy – Alternate Non-Executive Director (Svein Larsen resigned)

(5)The following Non-Executive director resigned:

- 1) Svein Larsen resigned on 8 August 2016. Due to his resignation, his alternate,  
Rune Remoy, ceased to be an alternate non-executive director.

(6) Circumvention of ICASA Regulatory Process

The **Sale and Transfer of Shares Agreement** was signed by all the shareholders and discussed at a board meeting of NWFM. Upon enquiring from ICASA, through the station manager, David Mabusela, on the process that needs to be followed in obtaining regulatory approval, Motswako sought to circumvent the process, hence their Court challenge that was instituted against ICASA. Prior to the court challenge, the board of NWFM had resolved to ensure that the regulatory process is fully adhered to as stipulated by ICASA. The board of NWFM went as far as establishing a sub-committee made-up of Mashilo Matsetela and Simon Ramodike, including the station manager, David Mabusela, to assist in the completion of the Form G. Mashilo Matsetela and Simon Ramodike must explain to ICASA why they refused to implement a board resolution. This decision of the board was communicated to Motswako, but they persisted with their unrelenting threats and bullying tactics, culminating in the court action against ICASA.

(7)Motswako took ICASA to court on 14 November 2017, seeking a declaratory order, which would have effectively disregarded the authority of ICASA on the matter. When this failed, we suddenly witness the appointment of alternate non-executive directors en masse by the departing shareholders. Instead, Motswako appointed their representatives as alternate non-Executive Directors on the board of NWFM. These appointments were aided by representatives of

*21<sup>st</sup> Venture Capital, Sadtu Investment Holdings, Motwere Trading and Khethani Trust. 21<sup>st</sup> Venture Capital and Khethani Trust have appointed alternate non-Executive directors who are essentially Motswako representatives. Their names are Suping Mangope, Dennis Madondo and Lawrence Kgamanyane Tlhabane respectively.*

*(8)These appointments together with the supporting resolutions are unlawful and invalid for the following reason: 21<sup>st</sup> Venture Capital, prior to the above changes, would have had three non-executive directors on the board of NWFM, which is not permissible in terms of the Shareholders' Agreement and station's License Conditions, as a foreign controlled entity. The three representatives are: Rune Remoy, Pearl Sokhulu and Svein Larsen.*

*(9)To make matters worse, Lawrence Kgamanyane Tlhabane was immediately appointed as the Acting Station Manager to take control of the station on behalf of Motswako without ICASA approval. David Mabusela, who was the station manager, was forced to resign due to unbearable pressure and interference from Motswako. Lawrence Tlhabane has been irregularly appointed as the Acting Station Manager and must not be recognized as the designated contact person with ICASA.*

*(10)As a board member, I was not party to the meeting that appointed the Acting Station Manager, nor have I had sight of his CV, including his designation as the contact person from NWFM. I am unaware of any submission that was made on behalf of North West FM (NWFM) to ICASA in respect of the Acting Station Manager being the new contact person. Ever since the board changes were made, I have been ex-communicated from the affairs of the station as a board member and operational decisions are no longer the purview of staff and management but Motswako. This can be verified by simply interviewing staff. This, in my view, is disregarding ICASA and pre-implementing a transaction that needs regulatory approval.*

*(11)One of the key entitlements of shareholders is to vote at a shareholders' meeting but it must surely comply with the provisions of the Companies Act, MOI and Shareholders Agreement. In the case of North West FM (NWFM), it should also comply with our Licence Conditions and, equally important, the regulatory process. The foregoing legal agreements and regulated / legislated provisions should be reflected in the composition of the board of NWFM. This, in my humble opinion, is not the case, apart from how resolutions were subsequently made and communicated. There has been a total failure on how board meetings are convened, and decisions made. The purpose of excluding me from board*

*meetings is a deliberate and orchestrated effort to suppress and silence the views of a fellow shareholder and board member. The illegal actions and practices of the majority cannot be countenanced. These actions could also put NWFM's licence at risk and the licence renewal process, which is currently under adjudication.*

#### *(12) Sale and Transfer of Shares Agreement*

*In the Sale and Transfer of Shares Agreement previously mentioned, the purchase consideration for the selling shareholders includes the repayment of shareholder loans/claims. I refer you to clause 6.2.1 of the Agreement, requiring the purchase price to be payable to the selling shareholders nominated attorney's trust account or a guarantee for the purchase price is furnished. This has not occurred despite repeated requests for confirmation of funds at board meetings and through the station manager, David Mabusela.*

#### *(13) Funding*

*Motswako has made series of payments to Sentech without board approval or any formal agreement. The locus standi of Motswako in respect of the station and these payments remains unknown, including the repayment terms and conditions. As much as these payments are noted, any rational and commercially minded person would seek to conclude legal agreements prior to releasing such funds. This, in my view, is a carefully orchestrated plan designed to influence and persuade ICASA to overlook the contraventions committed by Motswako.*

#### *(14) Service Level Agreement*

*The station has entered into a Service Level Agreement with Motswako, which has been withheld from the board and only made available to Motswako representatives on the board, including Simon Ramodike and Mashilo Matsetela.*

#### *(15) Conclusion*

*The haste in which changes to the board of NWFM have been made irregularly, resulting in Motswako taking control of the station, including but not limited to management control; news and current affairs; and sales with the collusion of non- executive directors (directors) of NWFM is not only putting the station's licence renewal process at risk but creating serious reputational damage to the station and undermines the authority of ICASA. Motswako needs to vacate the premises of the station forthwith, and the alternate directors need to do the right*

*thing by resigning to allow the board of NWFm to independently engage ICASA on the proposed transaction and the completion of the Form G.*

*These developments were brought to the attention of ICASA several month ago with a view that Motswako would yield to ICASA's call to complete the Form G and not to interfere in the affairs of the station or pre-implement the transaction without regulatory approval. These engagements culminated in a meeting that was convened by ICASA, on the 23 April 2018, inviting all the board members of NWFm. Interestingly, Mashilo Matsetela was unavailable and only the alternate directors attended on behalf of 21<sup>st</sup> Venture and Khethani Trust. ICASA requested the parties concerned to complete and submit the Form G and also to amend the Sale and Transfer of Shares Agreement, taking into consideration the prescribed regulatory process that needs to be followed in respect of changes in shareholding. The parties were granted a week to submit the foregoing information. The request/deadline has been ignored by Motswako together with the alternate directors in attendance. Motswako's interference in the station has been incessant, resulting in the email below from Boikanyo Mosele, which refers to NWFm chairperson (Mashilo Matsetela), who will be introducing the Motswako Team, dated 7 June 2018, and my response directed to ICASA.*

*I am appealing to the Complaints and Compliance Committee to intervene as a matter of urgency. The latest development as mentioned above is a clear indication that the parties concerned have no intention of abiding by ICASA's prescribed regulation on ownership changes.*

## **RESPONSE OF NORTH WEST FM**

[6] North West FM, through one of its directors, Mr Masekela Ramodike, filed an Answering Affidavit in which all charges were countered.

6.1 He stated that the transaction with Motswako was duly authorised by the Board of Directors and that ICASA had been approached for its authorisation of the amendment in the shareholding which would follow after approval by ICASA. ICASA has on the 7<sup>th</sup> June 2018 published a Notice in the *Government Gazette* calling for representations within 14 working days. ICASA had also been notified of the change of contact person for the licensee.

6.2 Mr Ramodike denies that any changes to management have been effected without Board approval and also states that alternate directors have been appointed in accordance with the shareholders' agreement.

6.3 All directors' meetings were called in accordance with the shareholders' agreement and Round Robins were executed in accordance with the said agreement.

6.4 No negative inferences should be made from Motswako's application to the High Court for a declaratory order. It is the right of any interested person to take a matter to Court. The matter was, in any case, settled. No negative inference may also be drawn from the fact that the second to fifth Respondents did not oppose the Court application. They were subject to the application whether they opposed it or not. In any case, the Court application is now academic.

6.5 There was also no collusion as to the appointment of alternate directors. Every director is entitled to appoint an alternate director. In fact, the Complainant had recently exercised this right himself. The alternate directors had also been appointed validly.

6.6 It is denied that the Complainant was "excommunicated" from the Board. He has the right to be present at all meetings. The allegation is also denied ( and regarded as offensive) that the sixth respondent (the acting station manager) was appointed on behalf of Motswako and not in the interest of North West FM.

6.7 The applicant has also not deliberately been excluded from Board meetings. The applicant has the right to call and attend meetings and has access to information held by and on behalf of the Radio station.

6.8 The validity of the transaction with Motswako has never been in doubt.

6.9 It is confirmed that the Radio Station's financial position has been dire. There was also a commitment by Motswako that it would assist with operational expenses pending regulatory approval. Motswako has, in fact, paid certain amounts to keep the station alive and protect its employees.

7. It is denied that Motswako has taken operational control of the Radio station. The alternate directors are not Motswako representatives. They have been appointed through a transparent process by the Second and Third Respondents. Form G has been submitted to ICASA. There has been a notice by ICASA in the Government Gazette of 7 July and there has also been a press release on it.

7.1 The Complainant has been invited to Board Meetings and has elected not to attend them.

7.2 The Respondents are satisfied that if the transaction with Motswako is approved by ICASA it will bring stability to the Radio Station and enable it to compete fairly in the ICT Sector and, in particular, in the broadcasting sector. It will also enhance equity by historically disadvantaged persons in the First Respondent to 90% - a commendable feat in the Industry. It will also serve the public interest with the footprint of the Radio Station having a stable station that interacts with its audience.



## REPLY BY THE COMPLAINANT

[8] The main points raised by the Complainant (in some instances simply referring to the Complaint) were the following:

8.1 It has been impossible for the Complainant to obtain a copy of the Service Level Agreement with Motswako.

8.2 The complainant has not, at any stage, agreed to the prospective buyer to take control of the radio station.

8.3 The Resolutions removing the Complainant and suspending the Station Manager cannot stand because they were done by “illegal” people who are essentially Motswako Media Group Representatives. The aim was to silence the Complainant and the station manager for insisting that the ICASA processes must be adhered to.

8.4 Operational decisions are no longer the purview of staff and management but the prospective buyer. Simply interviewing staff can verify this, especially SALES and NEWS. This, in my view, is disregarding ICASA and pre-implementing a transaction that needs regulatory approval. The Complainant attached a rate card which (in his opinion) shows advertising of Motswako Media Group Subsidiaries.

8.5 The Complainant then states as follows: Let me deal with the proof of payments attached. These copies are duplicated deliberately to confuse the regulator. The point is that these 4 payments were invoiced by the station for advertising booked by Motswako on behalf of their clients. When an agency books advertising, it cannot be misconstrued as “bailout.” There are several agencies doing the same on behalf of the station. This gross dishonesty is a reflection of their conduct. It is ironic that these are the people who want to be trusted with a radio license. Page 48 is exactly what I questioned in my founding affidavit. Motswako Media Group is not invoiced by Sentech. The Board has not approved this “arrangement.” What are the terms and arrangements?

8.6 I have asked for the signed SLA and it has not been sent to me. ...ICASA has also asked for it. It was not given to (ICASA)...It was the most important document that was supposed to be attached to their answering affidavit but it was deliberately omitted from the submission. The issue of media independence must be respected. To credit the source of news is not an issue at all and it must be done. The problem is that a media agency is imposing itself on the media house. North West FM News must be the one approaching different news sources and not NEWS NOTE instructing the news room North West FM to cover their stories as this is the case right now. This can be verified by interviewing the staff.

8.7 Conclusion

It cannot be right to circumvent the processes of the Regulator by assuming management control before the approval. It cannot be allowed to have Motswako Media Group Employees and representatives on the Board disguising as 21<sup>st</sup> Venture Capital alternate board directors and Khetani Trust respectively (representing the buyer and the seller at the same time). Dennis Madondo is an employee of Motswako Media Group. Please refer to the audio submission where Tebogo Pooe, the Chairman of Motswako Media Group, was introducing him to the staff of North West FM at the meeting of the 11<sup>th</sup> June 2018. Motswako Media Group representative, Lawrence Thabane must vacate the premises of North West FM immediately and him together with the other representatives must resign from the Board of North West FM. The decisions they made must be reversed with immediate effect. Refer Audio Annexure.

## **LEGAL APPROACH TO THE MATTER**

[9] Navsa JA states in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013 (5) SA 24 (SCA) at para [1]:

“Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. *This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.” (emphasis added, footnote omitted).

The CCC is bound by this principle. It is not its task to delve into the running of a broadcaster – unless it is entitled to do so, as would be the case with the SABC, where its investigative powers are directly derived from the Broadcasting Act 1999. Thus, the CCC has held that the SABC had acted outside its powers by introducing censorship of a category of materials which would cover the setting alight of government buildings as part of protest action<sup>2</sup> and not having consulted satisfactorily on its new news policy.<sup>3</sup>

North West FM is a broadcasting licensee and its governing body, which is the licensee, is governed by company law. Its directors are shareholders and, as Mr

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<sup>2</sup> *Media Monitoring & Others v SABC* Case 195/2016.

<sup>3</sup> *SOS Support Public Broadcasting Coalition and Media Monitoring v SABC* Case 214/2016.

Setzin stated during argument, each director “votes his shares.”<sup>4</sup> Of course, directors also have fiduciary duties when they attend Board Meetings. A complaint as to the running of a licensee is, in the ordinary course, a matter for the Courts, unless the licence conditions and/or legislation grants the CCC jurisdiction. Insofar as commercial broadcasters are concerned sections 53-61 and 64-66 of the Electronic Communications Act grant the CCC jurisdiction. Section 50 deals with community broadcasters. None of these sections is applicable in this matter. Even if the CCC had powers in this regard, it should be stated that Mr Ramodike has answered the complaint satisfactorily. An aspect over which the CCC, however, does have jurisdiction, is dealt with in paragraph [10].

It should be mentioned that insofar as the allegation of biased broadcasting is concerned, balance is required in newscasts and a right of response is provided for in matters of public importance. A member of the public would have to lodge a complaint in terms the Broadcasting Code<sup>5</sup> before the CCC would consider a complaint which amounts to a prima facie contravention. No such complaint has been filed with the CCC.

[10] The Licence of North West FM contains several duties. The one which is relevant for present purposes is the following clause:

*Directors of the Licensee shall retain control and responsibility for the running of the licensee notwithstanding the provisions of any management consultancy services engaged by the Licensee.*

10.1 Mr Setzin argued that, at least indirectly, Motswako is exercising control over North West FM. After the contract for the sale of 50% shares was concluded,

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<sup>4</sup> Compare Piet Delpont (ed) *Henochsberg on the Companies Act 71 of 2008* (LexisNexis) at page 240(4): “A shareholder’s right to vote is a proprietary right of his shareholding (*Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 680). A shareholder may exercise his right to vote in any way he pleases and with regard, not to the company’s interests, but to what he considers to be in his own interests (see *Coronation Syndicate Ltd v Lilienfeld* 1903 TS 489 at 496–497; *Gundelfinger v African Textile Manufacturers Ltd* 1939 AD 314 at 326; *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1088; *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625 (Ch) at 635: “When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company who is exercising his own right of property to vote as he thinks fit” – per Walton J. If a shareholder is also a director, attending a meeting of shareholders and voting at such a meeting in the capacity of shareholder is not *per se* subject to the fiduciary duties as director: *Ben-Tovim* case *supra* 1088; *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 43825/2012 13 March 2013 (GSJ) para 22; reversed on appeal on different grounds: *Butler v Van Zyl* (554/13) [2014] ZASCA 81 (30 May 2014).”

<sup>5</sup> ICASA CODE OF CONDUCT FOR BROADCASTING SERVICE LICENSEES: Published under General Notice 958 in *Government Gazette* 32381 of 6 July 2009.

it has been paying Bills, ensuring that alternate directors are sympathetic towards it and that the Acting Station manager is of its choice - the station manager having been suspended by the Board. Mr Setzin had, despite requests in this regard, not been provided with a Service Level Agreement with Motswako.

10.2 Attorney Pierce argued that there is no evidence that Motswako is indeed exercising influence on the management or the Directors. In this regard it is important that any influence of this nature was also denied by Mr Ramodike in his Answering Affidavit. He, however, also stated that it is understandable that Motswako would be assisting with the payments of debts. Otherwise, Motswako might, when the transaction is approved by ICASA, find nothing more than an empty shell with a bad name amongst debtors and listeners. As promised at the hearing attorney Pierce filed a contract between North West FM and Motswako which sets out the manner of repayment of all debts paid by Motswako. There is, accordingly, no evidence of donations, which could have been regarded as improper. There is, in any case, no reason why the directors of North West FM may not bear in mind that North West FM has concluded a contract for the purchase of 50% shares with it and that the future of the station is, at this stage, dependant on the contract being approved by ICASA and the assistance of Motswako.

10.3 It is also noted that North West FM has concluded a contract with Motswako in regard to the following services to be delivered to the Station by Motswako. A copy of a letter to clients by the Managing Director, Lawrence Thabane, dated 9 July 2018 reads as follows:

*Dear Valued Client*

*Please be informed that the North West Board of Directors has appointed Motswako Media Group to handle its Sales, Marketing and News Operations.*

*The company brings with it all the necessary expertise and experience that will assist us to stabilise the station and improve the above mentioned areas of operation in order to make North West FM more attractive to both listeners and advertisers.*

*Your contact person at Motswako Media is Nnete Mabitsela and these are his details....*

*From now on please make use of the following banking details for all payments to the station: ...*

*Account Holder Motswako Media Group*

*.....*

*We look forward to a successful working relationship with you.*

*Yours sincerely*

.....

[11]The station manager (who is presently suspended) at the request of Mr Setzin gave oral evidence in which he made wide-ranging accusations relating to Motswako, in effect, running the station. This evidence was given at the end of the hearing. Mr Setzin had argued his case based on his affidavit, thereafter Mr Pierce, on behalf of North West FM, argued the case on North West's answering affidavit. Mr Setzin was then afforded the opportunity to Reply to the argument. According to the Regulations Concerning Aspects of the Procedure before the CCC 2009, the Chairperson determines the procedure to be followed in the case of a matter which is regarded as urgent. The Complainant, when filing the complaint, requested that the matter be regarded as an urgent matter. The undersigned agreed and set certain time lines and required that the Complaint be filed in the form of an affidavit and that North West FM respond to this complaint by way of an affidavit, which would also be replied to by way of an affidavit, if so decided, by Mr Setzin.

The High Court practice in regard to the filing of affidavits is applied by the CCC. That means that the affidavits would contain the whole case. Only in exceptional circumstances would evidence outside these affidavits be taken into consideration.<sup>6</sup> The evidence by the suspended manager supported the case of Mr Setzin. Even if we were to accept his evidence, it did not take Mr Setzin's case any further in so far as the above stated licence condition is concerned.

Mr Setzin made an audio copy available to the CCC from which he alleges that an inference of Motswako planning to take over the management of the station would be apparent. This amounts to evidence, which has to be substantiated under oath by the person who made the copy. This was lacking. In any case, it was not

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<sup>6</sup> See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H - 635C where Corbett JA ( the later Chief Justice) stated:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case (supra) at 1164) and the Court is satisfied D as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.' Also compare the judgment of Musi J in

copied to the Respondent. This evidence cannot, accordingly, be taken into consideration. And even if it were considered, the SLA and other arrangements as to, for example, news have been made available to the CCC – all of which demonstrates that the dealings with Motswako are regular.

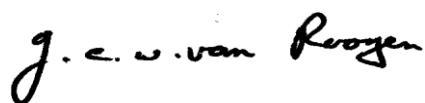
## **FINDING**

[12] In the light of the reasons provided above, the CCC has come to the conclusion that North West FM has not contravened the following licence condition (or any other licence condition): *Directors of the Licensee shall retain control and responsibility for the running of the licensee notwithstanding the provisions of any management consultancy services engaged by the Licensee.*

The following, in summary, supports this conclusion of the CCC:

- (a) All resolutions were validly taken by the Directors and taken in the interest of the survival of the station.
- (b) The relationship with Motswako is based on contract and where Motswako has taken care of debts, it was based on contract of repayment and not as a donation.
- (c) There is no evidence that Motswako or North West is simply accepting that the contract will be approved by ICASA – the necessary Form G has been completed and ICASA has published the sale of shares for comment.
- (d) The station is being run in the best interests of the station and to ensure that Motswako does not land with an empty shell if the sale of shares is approved by ICASA.

The Complaint is, accordingly, not upheld.



JCW van Rooyen SC  
Chairperson

The Members agreed.

17 August 2018