



COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Pre-Hearing: 13 September 2021

Case No. 415/2021

PRIMEDIA (Pty) Ltd

COMPLAINANT

v

Hot 91.9 FM

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Ms. Dimakatso Qocha - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Mr. Thato Mahapa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
Thamsanqa Mtolo - CCC Assessor
Xola Mantshintshi-CCC Assessor
Amukelani Vukeya - CCC Administrator

LEGAL REPRESENTATION FOR PARTIES

For the Complainant - Ms Justine Limpitlaw
For the Respondent - Adv Tshakane Mareleong

RULING

Judge Thokozile Masipa

1. INTRODUCTION

[1] Primedia is the Complainant in this matter. It brings a complaint against Hot 91.9 FM

(Hot FM) a community sound broadcasting licensee, for allegedly failing to comply with the terms and conditions of its licence conditions and/or contravening the SA Music Content Regulations.

[2] This is a pre-hearing conference conducted in terms of section 17C (4) of the Independent Communications Authority of South Africa Act No.13 of 2000, (ICASA Act).

[3] Section 17C(4) provides as follows:

"(4) The Complaints and Compliance Committee may hold a pre-hearing conference for the purpose of giving direction to the parties regarding the procedure to be followed at a hearing and other relevant matter determined by the Complaints and Compliance Committee."

HISTORICAL BACKGROUND

[4] At the outset it is necessary to deal with the historical background. On 3 May 2021 Primedia lodged a complaint with the CCC against Hot FM alleging non compliance with its Licence conditions relating to South African music content requirements as well as non compliance with the relevant Regulations.

[5] The letter of complaint reads thus in part:

" 1.2 Our client hereby formally complaints to ICASA's Complaints and Compliance Committee in terms of

1.2.1 section 17C (1)(a)(i) of the ICASA Act, 2000 (the ICASA Act) regarding the failure by Hot 91.9 FM, a community sound

*broadcasting service operating under broadcasting service licence
No. Class/Re/Com/R240/jJun19*

*(Hot 91.9 FM), which licence is attached hereto as Annexure A, to
comply with clause 5.1.2 of its licence which requires that 70% of
music broadcast is to be South African Music Content; and*

*1.2.2 section 17C (1)(a) (ii) of the ICASA Act, regarding the failure by Hot
91.9 FM to comply with the SA Music Content Regulations prescribed
by ICASA in terms of section 61(4) and (5) of the Electronic
Communications Act, 2005 (the ECA)."*

[6] In support of its complaint Primedia filed an affidavit by the music manager of 94.7 FM, Ms Debra-Anne Sharratt, together with various attachments as alleged evidence that Hot FM, in the three-month period from 1 December 2020 to 28 February 2021 Hot FM, did not comply with

"3.2.1 the 70% SA Music Content requirement stipulated in clause 5.1.2 of Hot FM's currently applicable licence; nor with

3.2.2 the 80% SA Music Content requirement in terms of section of the SA Music Content Regulations

for the broadcast period of three months from 1 December 2020 to 28 February 2021.

[7] In its response Hot FM denied that it had failed to comply with either its licence conditions or with the SA Music Content Regulations.

[8] On page 12 of the paginated papers paragraph 1.7 the Respondent states:

" Hot is entirely compliant with the local content requirements of its licence conditions and arguably even compliant with the requirements of the regulations, if they can be said to apply, and if they do apply. Hot has nonetheless been able to sustain "substantial performance."

[9] In paragraph 5 of the response, Hot FM sets out Hot's licence conditions and refutes Primedia's allegations. Paragraph 5.3 reads:

"5.3.1 Broadcasters submit reports to ICASA under the Compliance Manual Regulations, 2011 (the Compliance Manual Regulations), on a monthly basis as set out in form 8, 8A, 8B and 8C of the Compliance Manual Regulations.

5.3.2 Under paragraph 5.2 of its licence, the licensee is required to present 30% Talk and 70% Music on a monthly average basis .

*5.3.3 Therefore, the allegation contained in the affidavit of Ms Debra-Ann Sharratt in paragraphs 5 to 8, that **"...in the three-month period from 1 December 2020 to 28 February 2021, Hot FM did not comply... for the broadcast period in any single week during the three months mentioned. Indeed, the maximum percentage of SA music played in a single week during the three-month period reviewed was only 31.33% (thirty one point thirty three percent)"** are founded on a **misunderstanding of both the Compliance Manual Regulations and the licence conditions.**"*

5.3.4 While the recording of the music played is done on a weekly basis, the measurement for compliance purposes takes place on a monthly average basis.

5.3.5 Primedia mistakes the measurement period for a shorter period than it is in terms of the regulations and the Hot licence conditions.

5.4 Primedia's complaint is based on a fundamental error in the calculation of music by calculating music played over a week, rather than a month. Its complaint should as a result be dismissed."

[10] The Respondent then points out that the logs prepared by Ms Sharratt are defective or incomplete as they omitted in excess of 2,500 "spins" or plays of local music.

[11] In addition the Respondent submitted Annexure C indicating which songs were not reported in the logs submitted by Primedia as part of their complaint. Also submitted, among others, was Annexure D detailing how these logs were compiled.

THE PRE-HEARING CONFERENCE

[12] Both parties were of the view that a pre-hearing conference would benefit all the parties and that this would also assist the CCC to determine the issues expeditiously.

[13] It was against the above background that the pre-hearing was held. At the pre-hearing conference the main question was whether or not the CCA is to be approached with a request to make a factual finding on the percentage of SA Music Content broadcast during the period the complaint pertains to and if so, what form the respective logs are to be provided to the CCA to enable that factual evaluation to be undertaken.

DIRECTION REGARDING THE PROCEDURE TO BE FOLLOWED AT THE HEARING

[14] Though both the Complainant and the Respondent were *ad idem* that the CCA, as a neutral third party, should be requested to make a factual finding on the percentage of SA Music Content broadcast during the relevant period and that this should be done before the main hearing of the merits, there was, however, no agreement on what documents, (the logs), were relevant for purposes the hearing.

[15] The Respondent contended that "each set of logs must be physically compared with the other set of the Hot 91.9 logs to determine whether or not Hot 91.9 met its local content quota. The basis of this contention was that comparing the logs is a substantial task that cannot practically be carried out during the course of a Committee hearing. The suggestion was that the task of comparing the logs could be given to ICASA's internal compliance unit, (the CCA). As a neutral third party the CCA, would, after comparison, present their report to both parties and to the CCC before the hearing.

[16] Although the Complainant agreed to the suggestion in principle it had a different suggestion as to what was to be presented to the CCA for comparison. According to Primedia, the logs as presented to the CCC were

incomplete and did not constitute the full set of logs. Annexure B to Hot 91.9's response as contained in the amended bundle contains only the SA music tracks that Hot FM alleges were omitted from Primedia's initial logs. These logs, according to Primedia, do not constitute the full set of logs for the station against which to do any kind of comparison.

[17] In view of the above, according to Primedia, the best way to deal with the above challenge is that each party should provide the CCA with its version of the full set of logs for the period 7h00 to 21h00 daily (the SA performance period as it was then) from 1 December 2020 and 28 February 2021 on Hot FM clearly determining the amount of SA music played in that period.

[18] After hearing the parties and considering the issues before it, the CCC was unpersuaded that the involvement of the CCA in the manner suggested by the parties was warranted at this stage for the following reasons:

18.1 The CCC's view is that involving the CCA at this juncture, for purposes of comparing logs in whatever form or nature, before the hearing has taken place, would be premature. The preferable route would be for the CCC to go into a hearing with an open mind and hear both parties on the issues to be determined. This would also serve to avoid creating an impression that the CCC has prejudged the issues.

18.2 There is another reason why the CCC is disinclined to approach the CCA with a request as suggested by Primedia, and Hot FM and it is this: As the compliance monitoring division of ICASA, the CCA has its own programme that guides it while it fulfills its functions and responsibilities in terms of the ICASA Act. The CCC is loathe to disturb this programme and timelines which may not necessarily fit in with those of the CCC.

18.3 To request the CCA, therefore, to assist the CCC in the manner suggested and to give such assistance within a specified deadline, before the hearing, is clearly not feasible.

[19] Accordingly, the submission that the CCA be requested to make a factual finding on the percentage of SA music content broadcast by Hot FM, during 1 December 2020 to 28 February 2021, from 7h00 to 21h00, by comparing the relevant logs, cannot be acceded to.

[20] In the result, the CCC shall proceed to hear the matter (on a date still to be decided in due course). At the hearing, the parties shall be allowed to present their cases fully, make submissions and argue on only the papers that have been filed with the CCC. These papers are the complaint and annexures by Premedia;

answering papers and annexures by Hot FM;

and a reply and annexures by Primedia, if any.

[21] Only after hearing the parties shall the CCC decide:

21.1 Whether it needs more information to determine the issue before it;

21.2. The nature of such information; and

21.3. Whether or not to seek the assistance of the CCA or some other expert.

[22] Meanwhile the CCC gives the following direction regarding the hearing of the complaint on a date still to be determined:

22.1 As the Complainant, Primedia has the duty to begin and a right of reply after Hot FM has made its response.

22.2 In addition, should there be issues that still need to be clarified, the parties may be granted more time to make additional submissions (oral or written), either at the hearing or after the hearing.

[23] The logs which are the subject matter of the complaint are limited to those relevant to the complaint on the one hand and relevant to the defence, on the other. The Complainant's original complaint stands as the complaint before the CCC.

[24] The parties are required to submit their written heads of argument within five (5) days of receipt of this judgment as already set out in the letter from the Office of the CCC.

[25] The suggestion by Hot FM that Primedia submits its Heads of Argument first is acceded to.

TMMasipa

Judge Thokozile Masipa

CCC Chairperson