



COMPLAINTS AND COMPLIANCE COMMITTEE

Date Heard: 6 September 2021

Case number: 420/2021

PRIMEDIA

COMPLAINANT

v

ICASA

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 ICASA - Adv. Mduduzi Skhosana
Mr. Ferlman Jwankie

JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

[1] The Complainant in this matter is Primedia (Pty) Ltd, the licensee in respect of four commercial sound broadcasting services, namely:- 702, 567 Cape Talk, Kfm 94.5 and 94.7 FM. In these proceedings it shall be referred to as Primedia.

[2] Primedia brought a complaint to the CCC against ICASA in terms of section 17C(1)(a)(ii) of the ICASA Act alleging that ICASA failed to comply with its legal obligations in respect of Pretoria FM and its affiliate stations under section 4(3)(d) of the ICASA Act.

[3] **Section 4(3)(d) of the ICASA Act** provides that ICASA

"must develop, monitor and enforce compliance with licence conditions and regulations consistent with the objects of this Act and the underlying statutes for different categories of licences."

[4] On 10 June 2021, the Office of the CCC forwarded the complaint to Mr Wellington Ngwepe, the CEO of ICASA, with a request that ICASA respond to the allegations in the complaint.

[5] In response, ICASA stated the following, amongst others,

"4. It is the Authority's view that the complaint before the CCC is not competent in law for the reasons outlined below:

4.1 Section 17D (2) of the ICASA Act stipulates that

"the [CCC] may recommend that one or more of the following orders be issued by the Authority, namely-

(a) direct the licensee to desist from any further contravention;

(b) direct the licensee to pay as a fine the amount prescribed by the Authority...;

(c) direct the licensee to take such remedial steps in conflict with this Act or the underlying statutes...;

(d)...;

(e) direct the licensee to comply with any settlement."

4.3 Sections 17B and 17C of the ICASA Act must be read with sections 17D and 17E thereof. Accordingly, the CCC does not have jurisdiction to receive complaints against the Authority, or any person that is not a licensee in terms of the underlying statutes."

THE NATURE OF THE HEARING

[4] In view of the above, the CCC decided to hear the parties on the preliminary point of jurisdiction only. Should the finding be that the CCC has no jurisdiction to hear the complaint then that would be the end of the matter.

[5] On the other hand, should the finding be that the CCC does have jurisdiction then the CCC shall have regard to the merits of the matter. For now, the merits of the complaint are not relevant unless they have a bearing on the question of jurisdiction.

[6] In paragraph 3 of paginated page 4 of the papers Primedia states that there has been ongoing non-enforcement by ICASA of regulatory provisions limiting programme syndication/networking and sharing of Pretoria FM's licence conditions.

[7] Primedia cites the following examples

"3.1 Pretoria FM has only ever received one ICASA Annual Compliance Report in 2019 regarding the 2017/8 period,....

3.2 None of its affiliate stations, namely: Radio Dagbreek, Radio Kransberg, Radio Magaliesberg, Radio Naboom, Radio Tafelkop, Radio Wolkberg, and Radio Ysterberg has received an Annual Compliance Report.

3.3 ICASA found, in its 2019 Compliance Report, that Pretoria FM:

3.3.1 Complied with clause 3 of its licence ... and that "Pretoria FM's

coverage area remains as prescribed in the licence terms and conditions. In the year under review, the Authority received no reports or complaints indicating that the radio station has gone beyond its licence area.” - at paragraph 3.3 of the Report; and

3.3.2 Complied “with the Standard Terms and Conditions for Class Broadcasting Service Licences ” - at paragraph 4.3 of the Report.”

[4] The summary of the complaint against ICASA is set out in paragraph 5.15 of the Affidavit from Primedia, where Ms Limpitlaw states:

“...there has been an ongoing lack of enforcement on the part of ICASA with the coverage area specified in Pretoria FM’s licence and/or with the regulations that restrict programme sharing/networking and programme simulcasting which is a violation, on ICASA’s part of section 4(3) of the ICASA Act.”

RELIEF SOUGHT

[5] Primedia requests the CCC:

“6.1.1 to investigate the complaint in terms of section 17B(a)(ii) and (iii) of the ICASA Act;

6.2.2 to make recommendations to ICASA regarding the performance of the functions of ICASA or achieving the objects of the ICASA Act in terms of section 17B(b)(i) and (ii) of the ICASA Act;

6.1.3 to consider the complaint in terms of section 17C(1)(b) of the ICASA Act;

6.1.4 to conduct an oral hearing in terms of section of section 17C(3) of the ICASA Act in respect of this complaint;

6.1.5 to make a finding in terms of section

17D(1) of the ICASA Act on this complaint;

6.1.6 *to make a recommendation to ICASA in terms of section 17D(2) of the ICASA Act in respect of this complaint regarding action to be taken by ICASA in regard to the complaint;"*

[6] Primedia persists that the CCC has jurisdiction to hear the matter. It concludes that *"there is a laucuna in the recommendations section (s 17E(2)(b)) of the ICASA Act in that it appears to empower the CCC to make recommendations only in respect of licensees. However, the CCC has the statutory power to investigate complaints regarding non compliance with licence conditions, or the ICASA Act or the underlying statutes, by licensees or, expressly, by "any other person" as is provided for in section 17C(1)(a) read with sections 17(C)(1)(b)(ii) and 4(3)(n) of the ICASA Act. Consequently, we think it imperative that the CCC recommend that ICASA complies with the obligations imposed upon it in terms of section 4(3)(d) of the ICASA Act by producing Annual Compliance Reports for all broadcasting services swines by it."*

THE NATURE OF THE COMPLAINT

[7] It is so that Primedia is aggrieved by what it perceives to be preferential treatment given to Community Broadcasters by ICASA.

[8] However, the right of the CCC to hear any matter is based on the scope of its authority, which is limited as shall be seen later in this judgment. Fortunately Primedia is not without recourse.

[9] Section 3(5) of the ICASA Act provides that *"a person affected by any action, finding or decision of the Authority may apply to a court with competent jurisdiction for review of that action, finding or decision."*

[10] In its submissions Primedia states that the conduct of ICASA, by failing to monitor compliance on the part of Pretoria FM, is *inter alia*, unfair

competition and has caused it prejudice. It is clear, therefore, that Primedia has been affected by the alleged decision of ICASA not to monitor Pretoria FM or not to take action against it. The proper avenue to follow would be for Primedia to take the matter on review to a court with competent jurisdiction.

- [11] There are several reasons why the CCC has no jurisdiction to hear the matter. Some of the reasons are a matter of common sense. The starting point, however, is the fact that the CCC is a creature of statute. To demonstrate that fact and for the sake of completeness it shall be necessary to deal with Section 17 of the ICASA Act extensively.

RELATIONSHIP BETWEEN ICASA AND THE CCC - The CCC is a creature of statute

- [12] The CCC is a creature of statute that would not be in existence but for the legislation that brought it into being.

The Establishment of Committees

- [13] Section 17 of the ICASA Act, which deals with the establishment of committees, reads as follows:

17 Standing and special committees –

"(1) the Council of ICASA may establish standing committees or special committees for such purposes as the Council may deem necessary with a view to assisting it in the effective exercise and performance of its powers and duties."

- [14] An examination of section 17 (1) of the ICASA Act shows the following important facts:

14.1 The Legislature empowers ICASA to establish standing committees or special committees. It is significant that ICASA is given a wide discretion in this regard. It decides the "purpose" for which a committee is established. More importantly, it is the Authority that decides the purpose it "deems necessary" with a view to assisting it

in the effective exercise and performance of its powers and duties.

14.2 From the above, it seems to me that the CCC is a business unit or functionary of ICASA. It is so that it is independent in the sense that it arrives at decisions without fear or favour, independent of outside interference. However, it still may not go beyond the scope set out in the statute itself.

[15] There is case law that supports the contention that the CCC and its Chairperson are no more than 'a business unit' within ICASA specifically.

[16] In the matter of **Democratic Alliance v Independent Communications Authority of South Africa and others (03462/2015) [2016] ZAGPJHC 238 (9 September 2016)** the court clearly recognized the close relationship and the inextricable link between CCC and ICASA. In that matter the court said the following:

*"The second, the third and fourth respondent are the internal structures or business units of the first respondent.
(They are referred to herein collectively as the Respondents.)"*

[17] In **Democratic Alliance** above there is no doubt that the three respondents namely -
the Chairperson of ICASA, as the Second Respondent, the CCC as the Third Respondent, and its Chairperson as the Fourth Respondent were viewed by the court as the same entity - 'a business unit within ICASA' .

The Limited Powers of the CCC

[18] There is another reason to support the contention that the CCC has no jurisdiction to adjudicate on the matter. In terms of the law the CCC does not have the power to make final decisions. Even its Orders are merely recommendations made to ICASA which recommendations can either be adopted or rejected by ICASA. Only ICASA can make a final decision.

[19] If we were to accept that the CCC has jurisdiction to hear the matter what would happen in the case where the CCC upholds the complaint? In my view this would cause some difficulty as ICASA can still decide to reject the CCC's findings and orders and only that decision would be final. Whatever decision ICASA will take in the present matter would always be viewed with suspicion. This is because no one can sit in judgment over their own case. And it could never have been the intention of the Legislature that in this case ICASA would be allowed to be the Respondent and the judge.

[20] Related to the above is the fact that in terms of the ICASA Act the CCC "*must submit a report on its activities to the Council if and when required or on the completion of its task.*" (See section 17(10) and 17E (3). Reporting on activities of the CCC, that include investigating a complaint against ICASA together with findings and recommended orders against ICASA, would create an anomalous situation which could never be contemplated by the Legislature.

The Composition of the CCC

[21] The composition of the Complaints and Compliance Committee is set out in section 17A. The relevant provision reads thus:

*"(1) The Authority must establish a Complaints and Compliance Committee which consists of not more than seven members, appointed for a three-year term of office which is renewable for one additional term only, **one of whom must be a councillor.**" (my emphasis).*

[22] The inclusion of a councillor in the CCC is a further demonstration that the CCC does not have jurisdiction to sit where ICASA is a party. The reason for this is again a matter of common sense. No one can be a judge in his own case.

Orders that the CCC may recommend.

[23] Yet another indication that the CCC has no jurisdiction is to be found in section 17E (2) of the ICASA Act which specifically identifies individuals or entities against whom orders may be recommended. The relevant section reads:

"(2) The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

(a) direct the licensee to desist from any further contravention;

(b) direct the licensee to pay as a fine the amount prescribed by the Authority in respect of such non-compliance or non-adherence;

(c) direct the licensee to take such remedial or other steps in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

(d) where the licensee has repeatedly been found guilty of material violations --

(i) prohibit the licensee from providing the licensed service for such period as may be recommended by the Complaints and Compliance Committee subject to the proviso that a broadcasting or communication service as applicable, must not be suspended in terms of this subsection for a period in excess of 30 days; or

(ii) amend or revoke his or her licence; and

(e) direct the licensee to comply with any settlement."

[24] As can be seen the whole of section (2) is dedicated to what orders can be recommended in respect of licensees only. The fact that nothing is said about "any other person" is not an oversight. The reason why no reference is made to "any other person" in this section is to be found in section 17C (1) (b) (iii) which sets out the manner in which the Authority may deal with

complaints concerning a person who is not a licensee.

[25] This militates against the notion in Ms Limplaw's submission that the CCC has jurisdiction to hear complaints against "any other person" including ICASA. It would make no sense for the CCC to hear a complaint against someone and not have the power to recommend an order.

[26] Casting more doubt on the contention that the CCC has jurisdiction to hear this matter is the wording of section 17C (1) (a) and (b) as well as section 17C (2) which in my view leave no doubt that the CCC has jurisdiction to hear complaints only against licensees. It is necessary to quote these sections in full.

[27] Section 17C(1) (a) reads:

*"(1)(a) A person who has reason to believe that a licensee or **any other person** (my emphasis), is guilty of any non compliance with -*

(i) the terms and conditions of a licence;

(ii) this Act;or

(iii) the underlying statutes,

may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

(b) The Authority may -

(i) where the complaint concerns a licensee, direct the complaint within 30 days of receipt of the complaint, to the Complaints and Compliance Committee for consideration;

*(ii) where the complaint concerns **a person who is not a licensee**, lay a charge against **that person** with the appropriate authority or institution or refer the matter to the appropriate authority or*

institution in terms of a concurrent jurisdiction agreement concluded between the Authority and that authority or institution within 30 days of receipt of the complaint; or

(iii) investigate the complaint as contemplated in section 4(3) (n)."

[28] It is worth repeating that as can be seen in section 17C(1) (b), where a complaint concerns a licensee, the Authority may direct the complaint to the CCC for consideration. However, where a complaint concerns a **person who is not a licensee**, the Authority may

1. lay a charge against **that person** with **the appropriate authority** or **institution**.
2. refer the matter to the **appropriate authority or institution** in terms of a concurrent jurisdiction agreement that exists between the Authority and that authority or institution.

[29] The section is, therefore, specific as to what kind of complaints are referred to the CCC for consideration. It is complaints concerning licensees, not complaints concerning any other person, that are directed to the CCC. So, even if it were to be accepted that the phrase "**any other person**" includes ICASA, the CCC would still have no jurisdiction to hear the matter.

[30] In any event, the CCC does not have to hear every matter that is referred to it by a Complainant. This is clearer from the wording of Section 17B (a) of the ICASA Act, which reads -

"The Complaints and Compliance Committee -

*(a) must investigate and **hear if appropriate**, and make a finding on -*

(i) all matters referred to it by the Authority;

(ii) complaints received by it; and

(iii) allegations of non-compliance with this Act or the underlying statutes received by it; and

(b) may make any recommendation to the Authority necessary or incidental to -

(i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or

(ii) achieving the objects of this Act and the underlying statutes.”

[31] While the CCC must investigate and make a finding on all matters, complaints and allegations referred to in section 17B(a) (i), (ii) and (iii), it does not have to hear every matter. This is confirmed by the phrase “hear if appropriate” which demonstrates that the CCC is empowered to reject a complaint where it is not appropriate to hear it.

CONCLUSION

[32] Jurisdiction cannot be assumed. Where it has been challenged, it must be proven, not by the CCC but by the party that is attempting to assert jurisdiction. In this case, that party is Preiedia. Having heard submissions by both parties and for all the reasons above, I am of the view that Primedia has failed to persuade the CCC that it has jurisdiction to hear the complaint against ICASA.

[33] The CCC has no power of oversight that it can legally exercise over the Authority. It cannot call it to account for any of its actions.

The fact that the CCC may in terms of section 17B(b) of the Act

“make recommendations to ICASA necessary or incidental to -”

1. the performance of the functions of the Authority in terms of the ICASA Act or the underlying statutes

2. achieving the objects of the ICASA Act and the underlying statutes

does not grant it jurisdiction to adjudicate matters where the Authority is a party.

[34] As stated earlier, though the CCC is independent, it was established by ICASA in terms of the ICASA Act. It can, therefore, not act outside the powers granted to it in terms of that Act.

FINDING

[35] In the result, the CCC makes the following finding:

35.1 The CCC has no jurisdiction to hear the complaint against ICASA;

35.2 The complaint in the present matter is, therefore, dismissed on that basis.

TMMasipa

Judge Thokozile Masipa
Chairperson of the CCC