



COMPLAINTS AND COMPLIANCE COMMITTEE

Date of Hearing: 23 September 2021

Case No: 414/2021

PRIMEDIA (PTY) LTD

COMPLAINANT

v

PRETORIA FM AND ITS 7 AFFILIATE STATIONS

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa – Chairperson
Ms. Yolisa Kedama - Councillor
Mr. Paris Mashile - Member
Mr. Peter Hlapolosa - Member
Ms. Ngwako Molewa - Member

FROM THE OFFICE OF THE CCC:

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

LEGAL REPRESENTATION FOR PARTIES

For the Complainant - Ms Justine Limpitlaw
For the Respondent - There was no legal representative for the Respondent.
Mr Willie Spies, Chairperson of the Board of Directors of Pretoria FM, gave submissions on behalf of the Respondent

DRAFT JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

- [1] The Complainant in this matter is Primedia (Pty) Ltd, a licensee in respect of four licensed commercial sound broadcasting services, namely, 702, 567 Cape Talk, Kfm 94.5 and 94.7 FM.
- [2] Pretoria FM, which is cited as one of the Respondents, is a community of interest sound broadcasting service licensee, operating under broadcasting service licence No. Class/Re/Com/R145/Feb/20 (Pretoria FM).
- [3] At this point, it is proper to differentiate between a geographic community and a community of interest. The first is a geographically founded community while the other is a group of persons or a sector of the public having a specific clearly defined common interest.
- [4] Pretoria FM operates seven community of interest radio stations that are known as its affiliate stations. It is licensed for seven specific areas in five different district municipalities. The present proceedings are about the relationship between Pretoria FM and its affiliates as well as about its *modus operandum*.
- [5] Primedia lodged a complaint against Pretoria FM and its seven affiliated stations namely - Radio Dagbreek, Radio Kransberg, Radio Magaliesberg, Radio Naboom, Radio Tafelkop, Radio Wolkberg and Radio Ysterberg.

It alleged that the Respondents were contravening regulations concerning programme syndication. It also alleged that the Respondents were not complying with their licence conditions. Pretoria FM denied the allegations. Details of the complaint as well as the basis of the denial are discussed later in this judgment.

THE PRELIMINARY POINT

[6] At the commencement of the proceedings, Pretoria FM sought to argue a point *in limine* concerning whether the CCC had jurisdiction to hear the matter. The point arose from the premise that since the defence of Pretoria FM was that it was operating on a valid licence, granted and issued to it by Independent Communications Authority of South Africa ("ICASA"), the CCC might have to determine the validity of the said licence. And this was beyond the jurisdiction of the CCC, it was argued.

[7] In my view, the argument in support of the point *in limine* on jurisdiction was misplaced.

As a result, the point was dismissed on two grounds namely:-

7.1 ICASA was not a party in these proceedings

7.2 The validity of the Pretoria FM's licence was not an issue. Rather the issue was whether the Respondent(s) had failed to comply with licence conditions and the applicable regulations.

7.3 In the event the Respondent(s) sought to raise a defence that Pretoria FM had a valid licence or permission from ICASA to do what it was doing, the CCC's approach would be limited to seeking proof of such a licence or permission to deviate from the regulations or licence conditions. Determining the validity of the licence or questioning ICASA's decision in granting the indulgence, if any, is not a function of the CCC. Rather it is a matter to be adjudicated by a Court with competent jurisdiction, if and when ICASA's decision is taken on review.

THE COMPLAINT

[8] The Complainant alleged that the Respondents failed to comply with section 10(2) of the Community Broadcasting Service Regulations contained in Notice 439 published in Government Gazette No. 42323 dated 22 March 2019 in terms of

section 4(3)(j) of the ICASA Act read with sections 4(1) and 5(7) of the Electronic Communications Act No. 36 of 2005 (ECA). ("the Regulations").

[9] Section 10(2) of the Regulations provides

"Programme syndication/network and programme sharing shall not exceed 20% of the community broadcasting licensee's programming."

[10] The Regulations define 'programme sharing/networking' and 'programme syndication' as follows:

"programme sharing/networking" means

programmes produced by one broadcaster and shared among different broadcasting licensees;

"programme syndication" means *programmes produced at a central hub, distributed and broadcast simultaneously by broadcasting licensees.*

[11] Inextricably linked to the above complaint is the allegation that Pretoria FM failed to comply with clause 3 of its licence conditions. According to the Complainant,

"Pretoria FM essentially operates a single service using its own licences as well as the licences (and importantly, the transmitters) of all its affiliate stations. It does this by simulcasting in a manner that does not adhere to the applicable regulations."

[12] Furthermore, Primedia stated:

"The licensee's coverage area has been greatly extended as a result of simultaneously, broadcasting its programmes on all of the transmitters licensed to its seven affiliates."

[13] The practice of syndication is routine worldwide in the entertainment industry and programme syndication is nothing new in the broadcasting industry. In South Africa, the regulation of programme syndication has been in place for a while as can be seen from some of the examples hereunder.

[14] The Independent Communications Authority of South Africa (ICASA) published Community Sound Broadcasting Services Regulations in Notice 755 of 2006 of the Government Gazette No. 28919 dated 6 June 2006.

[15] THE SCHEDULE sets out the objectives of the Regulations as follows:

"1.4 [to] ensure that programme syndication/networking and programming sharing between community sound broadcasting licensees do not exceed 20% of a community sound broadcasting licensee's programming;..."

[16] Clause 2.7 defines "**programme networking/syndication**" thus:

"programmes produced at a central hub, distributed and broadcast by sound broadcasting licensees;

[17] Regulation 9 of the Standard Terms and Conditions for Individual Licensees Regulations 2010 as amended in 2016 (Regulations) provides as follows:

"Program syndication must not exceed 20% of the licensee's programming."

[18] The above demonstrates the Authority's consistency in the regulation of programme syndication. The 20% threshold has been in place for a number of years.

[19] This stringent position was slightly varied by the ICT Covid-19 National Disaster Regulations in Notice 238 published in Government Gazette No. 43207 dated 6 April 2020 (the ICT Covid Regulations).

[20] Section 4(9) of these regulations provides that

"Programme syndication must not exceed forty five percent (45%) per week of a broadcasting service licensee's programming."

[21] It is these regulations that are the subject of these proceedings. Regardless of the regulatory prohibition against programme sharing/networking exceeding

20% and currently 45%, Pretoria FM was allegedly syndicating 100% of its programmes to its seven affiliate stations.

[22] Pretoria FM admitted that it was currently sharing 100% of its programmes, instead of 45%, with the seven affiliated stations. However, it denied any wrongdoing. In fact, in the course of the submissions by Mr Spies, it transpired that Pretoria FM has been operating in this fashion for many years, since 1995. Significantly, it did this with the full knowledge and apparent blessing of the Authority. (This point shall be addressed extensively later in the judgment when the defence of the Respondent(s) is discussed in full).

[23] As stated earlier, Primedia further alleged that Pretoria FM failed to comply with clause 3 of its licence which provides that it shall provide services

"in the greater Pretoria and its immediate surrounding areas within the City of Tshwane Metropolitan Municipality in the Gauteng province as set out in the licensee's radio frequency spectrum licence".

[24] Since the affiliate stations are situated in several areas, other than the Pretoria environs, the coverage area of Pretoria FM has, not surprisingly, been greatly extended. Primedia argued that the contravention of the Regulations and its licence conditions by Pretoria FM and its affiliates was unfair, anti-competition and discouraged investment. Furthermore, it was at odds with the three-tier system which differentiated between the public, commercial and community broadcasting services.

PROOF OF NON COMPLIANCE

[25] As proof of non compliance, Primedia relied on information that is publicly available such as Press reports as well as Pretoria FM's information published online, confirming that it is broadcasting a single service over all the transmission facilities of its affiliate stations.

[26] On its English Wikipedia page it states that Pretoria FM broadcast "24 hours a day in stereo on 104.2FM in the greater Pretoria area.

Various other transmitters (with their own frequencies) in South Africa broadcast the station's content further afield". This page also lists the coverage area of Pretoria FM including "Limpopo, Free State, Mpumalanga, North West, parts of KZN."

SYNDICATION - THE MEANING THEREOF

[27] While the Regulations set out the meaning of programme syndication, it might also be useful to search for other definitions elsewhere.

[28] Wikipedia defines syndication thus:

"Broadcast syndication is the practice of leasing the right to broadcasting television shows and radio programmes to multiple television stations, without going through a broadcasting network."

[29] What is common in the definitions above is that they all make reference to more than one licensee. Wikipedia refers to "*multiple stations*." This is an important point to bear in mind when we interpret the regulations and their applicability in the present matter.

HISTORICAL BACKGROUND OF PRETORIA FM

[30] It is necessary at this stage to briefly outline the historical background of Pretoria FM. As stated above, it is a community sound broadcaster serving a specific community of interest referred to as the Boere Afrikaners. It is licensed to operate seven community broadcasting services in five district municipalities. This is because the community of interest groups that it serves are scattered throughout the country in very small numbers. (It is, however, important to state that Pretoria FM does not broadcast in every province).

[31] In his submissions, Mr Spies painted a picture of Pretoria FM's humble beginnings. It started small in 1993 and gradually grew to what it is today. But the road it travelled was beset with challenges. In 1994 Pretoria FM was taken off air for a period of one year by the then Regulator. When it re-opened in 1995 its problems were far from over. It had to go to court eight times to defend its broadcasting rights before, in 2015, the issues were finally resolved, or so it seemed. That was when ICASA granted and issued licences to Pretoria FM to operate its affiliate stations. Five years later, the said licences were renewed without any challenges.

SUBMISSIONS

[32] On behalf of Primedia it was submitted, *inter alia*, that Pretoria FM as well as its seven affiliate stations were contravening the current regulatory prohibitions as they were syndicating 100% of the programmes produced by Pretoria FM. The affiliate stations were stand-alone stations with each requiring a separate licence, a separate renewal application and a separate amendment when such was necessary, Ms Limpitlaw submitted.

[33] She tied in her submission with her assertion that ICASA had the power to grant Pretoria FM a single licence with a single radio frequency spectrum licence that covered all the areas concerned. The fact that ICASA chose not to do so was an indication that each station was a licensee, it was argued.

[34] Ms Limpitlaw referred to what she termed "a cavalier attitude" on the part of Pretoria FM as it has been non compliant from 2016 to 2020 by "simulcasting five times the regulatory amount" , while from 2020 to date, the simulcasting has been more than double the amount allowed.

[35] It was further submitted on behalf of Primedia that the fact that the affiliates relate to the same community of interest is not unusual in the community broadcasting sphere as can be seen in religious stations, for example.

[36] In my view, reference to "a cavalier attitude" is misplaced and shows the danger of viewing facts in isolation. If my understanding is correct, Pretoria FM's claim

was not that it was above the law, as can be seen later in this judgment. Rather, its submission was that the regulatory prohibition on syndication does not apply to it when it shares programmes with its affiliates because there is only one licensee. It does, however, apply to it when it syndicates programmes to other licensees.

[37] There is a need to see the bigger picture, as Mr Spies urged in his argument. It is so that there is nothing unusual about a community of interest broadcaster. However, as a community of interest sound broadcaster, serving a very small minority, Pretoria FM is in a special position. Before that fact could be recognized, Pretoria FM had to assert itself and fight many battles in court. It also had to be on the alert and prepared to deal with issues of non compliance when these were brought to its attention by ICASA.

[38] As recent as 2019, Pretoria FM and its affiliates received notices of non compliance from ICASA. In those notices ICASA requested the following information:

38.1 Syndication, networks or programme sharing hours per week including the source of the syndicated programme, and whether it was locally or internationally sourced where applicable;

38.2 Current management contracts that the licensee had entered into.

[39] In response to the above request, Pretoria FM replied that it, as a registered licensee, produced 100% of the content that it broadcast to all the stations that it is licensed to operate and there were no management contracts between Pretoria FM and its affiliates.

[40] ICASA made no further query or follow up in this regard. Instead, on 13 November the same year, Pretoria FM successfully made an application to renew its licence as a licensee in respect of eight community broadcasting services. Licences were also granted and issued to all its affiliate stations.

[41] To understand the argument by Mr Spies that the regulations do not apply to Pretoria FM when it shares, with its affiliates, the programmes it produces, it is necessary to have regard to one example of a licence granted and issued to Pretoria FM to operate one of its affiliate stations.

[42] On page 159 of the bundle there is Annexure B. This is a CLASS BROADCASTING SERVICE LICENCE No.: Class/Re/Com/R263/Dec/20. The licence is granted and issued to Pretoria FM

“FOR THE PROVISION OF COMMUNITY BROADCASTING SERVICE TO BE KNOWN AS RADIO DAGBREEK.”

The licence, dated 1 December 2020, was signed for and on behalf of ICASA.

[43] On the second page of the licence, the SCHEDULE provides the following information:

"1. LICENSEE

The Licence is issued to

1.1 Name of entity: Pretoria FM

1.2 Name of the Station: Radio Dagbreek

1.3 Control of the Licensee: Control shall vest in the governing body of Pretoria FM.

1. LICENCE PERIOD

2.1...

2.2...

1. LICENCE AREA

The Licensee shall provide services in Greylingstad, Ermelo and surrounding areas within Gert Sibande District Municipality in the

Mpumalanga Province as set out in the Licensee's radio frequency spectrum licence.

1. *COMMUNITY*

4.1 The Licensee shall provide services to a Boere-Afrikaner community of interest residing within the geographic coverage area specified herein.

4.2..."

[44] Paragraph 6 of the licence states that the contact person for the licensee is Linda van Schalkwyk. Her office number is in Pretoria.

[45] Paragraph 7 deals with 'notices and addresses' and reads:

"7.1 The Licensee chooses the following as its principal addresses:

7.1.1 Postal Address: P O Box 75653

Lynwood Ridge

0040

7.1.2 Physical Address: Loftus Park

Block A

416 Kirkness

Arcadia

0007

[46] On 8 January 2021 ICASA granted and issued a radio frequency spectrum licence No.; Class/Com/RE/RF263/Dec/2020 to **Pretoria FM for "THE PROVISION OF A COMMUNITY SOUND BROADCASTING SERVICE TO BE KNOWN AS RADIO DAGBREEK"** Again this licence was signed for and on behalf of ICASA.

- [47] A perusal of the licences granted and issued in respect of the affiliate stations shows that, except for minor individual details, the licences share notable similarities.
- [48] All the affiliates have identical programming obligations, set out in clause 5.1 of their respective licences as Pretoria FM.
- [49] All have the same contact person, set out in clause 6 of their respective licences as Pretoria FM. In addition, none of them has a physical presence in the coverage area of the station itself.
- [50] Apart from the details on the licences, other unique features that the affiliates share are the following according to Primedia:
- 50.1 None of the Pretoria FM's affiliates has an online media presence on the web.
- 50.2 None is available on the Dstv Bouquet.
- 50.3 None of them streams independently of Pretoria FM. This brings us to the defence raised by Pretoria FM.

THE RESPONDENTS' DEFENCE

- [51] The Respondents denied allegations of non compliance with licence conditions or any regulation relating to programme syndication.
- [52] Explaining the basis of the denial Mr Spies drew the attention of the CCC to the definition of programme syndication which is "programmes shared among **licensees**."(my emphasis).
- [53] Mr Spies pointed out that in the present case we were dealing with only one licensee, that is Pretoria FM. When Pretoria FM syndicates any of its programmes to other licensees it always complies with the applicable regulations which limit the programme syndication to not more than 20%. However, when Pretoria shares its programmes with its affiliates it does not have to observe or comply

with the regulations concerned as there is only one licensee involved, not “licensees” in the plural. The regulations concerned, therefore, are not applicable to Pretoria FM when it shares its programmes with its affiliates, so it was argued.

[54] I agree with this submission. The language of the regulation is clear. In fact, all the regulations relating to programme syndication specifically mention ‘licensees’ in the plural and not a ‘licensee.’ That Pretoria FM and its affiliates, are excluded from the definition, is supported by the evidence that has been placed before the CCC in the form of licences issued to Pretoria FM in respect of the seven radio stations.

[55] In the example of Radio DAGBREEK above, the licensee is not DAGBREEK but Pretoria FM. This applies to all the other affiliates. In respect of DAGBREEK, the governing body is the Board of Directors of Pretoria FM. Again this is the position with regard to the other six affiliates.

[56] In my view, this shows, without doubt, that although there may be eight sound broadcasting services operating, we are here dealing with only one licensee, that is, Pretoria FM. In the result, in addition to broadcasting in the coverage area of Tshwane, Pretoria FM is legally entitled to run seven other stations in seven different localities.

[57] What is striking about this matter is that Pretoria FM has operated in this fashion since 1995 and has not tried to hide or disguise what it was doing. On the contrary, the information about its *modus operandi* is available to the public. It can also be seen from the papers and submissions that whatever Pretoria FM did has always been above board. It engaged with the Authority when this was necessary and made disclosure pertaining to its relationship with its affiliate stations. And when it felt that its existence was being threatened, it took the matter to court. In short, none of the workings of Pretoria FM was done surreptitiously.

[58] Currently, Pretoria FM operates on a renewed valid licence which was granted and issued recently. In my view, the granting of the licence to Pretoria FM in

these circumstances, by ICASA, is unlikely to have been an oversight or an error on the part of ICASA. I say this because shortly before Pretoria FM made an application for the renewal of its licence, ICASA had requested from Pretoria FM information pertaining to syndication percentages, (precisely the central issue in these proceedings), and management contracts. Pretoria FM readily submitted the requested information without trying to disguise the true state of affairs.

CONCLUSION

[59] Pretoria FM is a community sound broadcaster serving a specific community of interest. It is licensed to operate seven community sound broadcasting services. Those seven community broadcasting services are defined in all seven cases. The licences as well as the details therein serve as corroborating evidence. More importantly, in all the licences, two features stand out.

[60] The first thing that stands out is that Pretoria FM is the licensee in all the cases. The second is that the community to be served by the licence and by the broadcast is defined in clause 4 of the licence. It is provided that the licence shall provide services to a Boere Afrikaner community of interest residing within the geographic areas specified herein.

[61] In view of the above, the allegation that Pretoria FM is contravening its licence conditions and the regulations is without foundation. Pretoria FM is licensed to broadcast in the seven areas while the district municipalities where the broadcasts take place are clearly defined.

[62] In summary, there is one licensee, that is Pretoria FM. This is the entity that is licensed to transmit or broadcast to seven different areas to the Boere Afrikaner community. While the listeners reside in several geographic locations, they are in fact one community which share a specific interest, such as culture, and Boere music. Because the number of people forming the specific community of interest is not big enough to allow the transmitters to become fully fledged, independent autonomous community broadcasters, Pretoria FM has continued to share 100% of its programmes with its affiliates.

[63] It is necessary to state that at a certain point Pretoria FM had more affiliate stations. Over time, some of these affiliates developed their own characters and became fully independent. On the other hand, the seven affiliate stations have been unable

“to grow into fully fledged independent self-sustaining stations.”

[64] The reasons for the above were stated succinctly by Mr Spies thus:

"The reason for that is that the market that is being served, that market being known as Boere Afrikaners, people liking Boere music and religious programming, news and Afrikaans music. That market, those markets in those specific municipal districts are tiny minorities. They are minorities in the extent of 5% to 10% of the population within those districts. So, it is very difficult for a tiny minority within a small area which is rural, which is not urban, it is difficult to conduct an independent radio station in those areas that stays on air for 24 hours."

[65] It seems to me that in the present case, ICASA dealt with Pretoria FM on its own merits and granted it a special dispensation to enable it to operate the way it does. I say this for the reasons below.

[66] The *modus operandum* of Pretoria FM has never been a secret. It operates the way it does openly even to the extent of making public announcements on the issue. When its footprint increased, and it started to broadcast in several areas, it went public. In my view, it is highly unlikely that a wrong doer would publicly announce its illegal conduct as a milestone.

[67] Before it was granted a licence, Pretoria FM made submissions to ICASA in support of its application. This process would have been repeated at the time Pretoria FM applied for a renewal of the licence. None of this was controverted by the Complainant.

[68] Pretoria FM is not only licensed to broadcast in the Tshwane area, but it is also licensed to broadcast in other seven different areas. The allegation that Pretoria FM has contravened its licence condition, therefore, has no basis.

[69] Similarly, with regard to the alleged contravention of the regulations pertaining to programme syndication, the complaint cannot be upheld. Notably Spies submitted, *inter alia*, that in cases where Pretoria FM syndicates its programmes to other licensees, it adheres to the regulatory limit of not more than 20%. This too was not contradicted.

FINDING

[70] Having regard to the totality of the evidence, the CCC makes the following finding:

70.1 The complaint against Pretoria FM that it failed to comply with Section 10(2) of the Community Broadcasting Service Regulations contained in Notice 439 published in Government Gazette No. 42323 dated 22 March 2019 in terms of section 4(3)(j) of the ICASA Act, read with section 4(1) and 5(7) of the Electronic Communications Act of 2005 (the ECA), **is not upheld.**

70.2 The complaint against Pretoria FM that it failed to comply with section 3 of its licence conditions, **is not upheld.**

70.3 Accordingly No ORDER is recommended

TMMasipa

Judge Thokozile Masipa

CCC Chairperson