



COMPLAINTS AND COMPLIANCE COMMITTEE

DATE OF HEARING: 5 NOVEMBER 2021

CASE NO: 417/2021

PRIMEDIA (PTY) LTD

COMPLAINANT

V

MAGIC AND LM RADIO

RESPONDENT

CCC MEMBERS:

Judge Thokozile Masipa –Chairperson
Councillor Yolisa Kedama- member
Mr Peter Hlapolosa - member
Mr Thato Mahapa - member
Mr Paris Mashile - member
Ms Ngwako Molewa - member

FROM THE OFFICE OF THE CCC:

Lindisa Mabulu - CCC Coordinator
Meera Lalla - CCC Assessor
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: Ms K Edmunson

JUDGMENT

Judge Thokozile Masipa

1. INTRODUCTION

[1] In this matter, 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, brought a complaint against LM Radio and Magic 828, ("the Respondents").

THE RESPONDENTS

[2] LM Radio operates under broadcasting service licence No. 020/COMMERCIAL/R/JUL/2-14 (LM Radio) while Magic 828 FM operates under broadcasting service licence 021 COMMERCIAL/R/JUL/2-14. The Respondents are, therefore, two separate licensees. (The significance of this point shall become clear in due course).

[3] I shall refer to Primedia (Pty) Ltd as the Complainant and to Magic 828 and LM Radio collectively as the Respondents.

THE COMPLAINT

[4] On 13 May 2021, the Complainant lodged a complaint with the CCC against the Respondents.

[5] The basis of the complaint was that the Respondents failed to comply with section 9(4) of the Standard Terms and Conditions for Individual Licence Regulations contained in Notice 525 published in Government Gazette 33294 dated 14 June 2010, as amended, in terms of section 43(j) of the ICASA Act, 2000 ("the ICASA Act"), read with section 8(3) of the Electronic Communications Act, 2005 ("the ECA").

[6] The section provides as follows:

"Programme syndication must not exceed 20% of a licensee's programme."

[7] This restriction was varied by the ICT COVID-19 National Disaster Regulations in Notice 238 published in Government Gazette 43207 dated 6 April 2020 ("the ICT Covid Regulations"). Section 4(9) thereof reads:

"Notwithstanding the provisions of the Regulations and any licence issued, the following minimum standards shall apply during the subsistence of the National State of Disaster - (9) Programme syndication must not exceed 45% per week of a broadcasting service licensee's programming."

[8] The Complainant alleged that the Respondents exceeded the prescribed limit of 45% by far. In support of the allegation, Primedia attached an affidavit by Mr Alan Matthews, Group Broadcasting Manager at Primedia. The allegation was that for a period from 05 - 11 April 2021, Magic 828 and LM Radio syndicated 93.87% of their programming during the programme period, thereby syndicating 92 hours of programming out of the weekly broadcast period of 98 hours.

[9] Mr Matthews broke down the period

5 - 11 April 2021 as follows:

14 hours a day Monday to Friday;

12 hours on Saturday;

10 hours on Sunday.

THE RESPONDENT'S DEFENCE

[10] Lyndon Johnstone responded to the complaint on behalf of both Respondents.

He denied that the Respondents were guilty of any wrong doing and set out a purported defence in the paragraph hereunder as follows:

"Altius Trading 460 Pty Ltd trading as Magic 828, with a footprint in the Cape Town Metropolitan area (Magic) and Extriserve Pty Ltd, trading as LM Radio, with a footprint in Gauteng (LM Radio) have been operating in the commercial sound broadcasting market since 2015 and 2017 respectively (the Stations). They operate on AM frequencies. To date neither has amassed a significant audience due to the inherent costs of operating in radio, the economic climate in South Africa and more recently, as a result of the COVID-19 pandemic.

Competition for advertising is fierce in their respective footprints and advertising revenue is diminishing.

It is for this reason that the Stations have simulcast (not syndicated) a section of their programming. This is not prohibited by law..."

[11] As can be seen from the above, the Respondents' defence is not only vague in the extreme but it is also bad in law.

[12] On page 29 of the bundle, paragraph 4(c) of the Respondent's Further Response the Respondents averred that they were saving costs *"without breaking any law."*

[13] This bald denial left much to be desired as there was no basis to support it. There may be cases where it is not possible to give reasons for a denial but this is not one of those cases.

- [14] As a point of departure it is always useful to define the term under discussion. What do the terms "syndication" and "simulcasting" mean? Are they related or are they two different concepts?

THE MEANING OF THE TERMS

[15] **Syndication**

15.1 Regulation 9 of the Standard Terms and Conditions for Individual Licensees Regulations, 2010 as amended in 2016 (the Regulations), provides that

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

15.2 Yet there is no definition of "syndication" or "programming" in these regulations.

The term is, however, defined in the Community Broadcasting Regulations as follows:

"programmes produced at a central hub distributed and broadcast simultaneously by broadcasting licensees".

15.3 A further definition of programme syndication from Wikipedia is the following:

"the ability to broadcast the same programmes over multiple radio stations...that is, an agreement to broadcast content from a centralized source."

- [16] Counsel for the Respondents argued, correctly in my view, that the term as defined in the Community Broadcasting Regulations is applicable to Community Broadcasting only and may not be applicable to any other Regulation. The approach is to be found in case law. (See

Independent Institute of Education (Pty) Ltd v Natal Law Society and others [2019] ZACC 47). This, however, does not mean that the definition from the Community Broadcasting Regulations is irrelevant. Depending on the circumstances, it may assist to establish whether the Respondents have contravened the Regulations as alleged.

[17] **Simulcasting**

17.1 ICASA defines “simulcasting” in the Digital Sound Broadcasting Services Regulations, 2021, as

“... a simultaneous transmission of the same sound broadcasting service on two or more channels or media.”

SUBMISSIONS BY COUNSEL

[18] Counsel for the Complainant submitted that the very same definition of “programme syndication” from Wikipedia, provided in the Respondents’ response fits in with what the Respondents were doing. One would have expected the Respondents to deny this and offer an explanation. That did not happen.

[19] Instead, counsel for the Respondents submitted that the Respondents had not contravened any legislation. What the Respondents were doing was to simulcast content which had nothing to do with programme syndication, was the submission.

[20] These divergent views prompted the CCC to resolve to consult an expert on the matter. So, on 23 November 2021, the CCC consulted the Licensing and Compliance Division and requested it to provide a write up in which the two concepts were defined. In addition, there was a request to explain the differences, if any, between programme syndication/sharing concepts v simulcast.

[21] The write up was forwarded to counsel for the parties so as to give them an opportunity to make submissions should they so wish. The CCC is grateful to the said Division for its assistance and to counsel for the parties for their submissions.

THE LICENSING AND COMPLIANCE DIVISION

WRITE UP

[22] For convenience the write up is reproduced hereunder in as much detail as possible:

Programme Syndication is defined as

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

[23] To elaborate, the Licensing and Compliance Division gave the following example:

"Radio Station A and Radio Station B broadcast a programme at the same time, originating from the same source/central hub.

Example: a case of Radio Pulpit syndicating programmes with each other. The Compliance Department needs to verify that the syndication of the programmes does not go beyond the threshold of 20% as outlined in the Community Regulations or 45% in terms of the Covid-19 Regulations, whichever is applicable.

On the basis of the abovementioned, sharing/networking or syndication of programmes, viewed collectively, should not exceed the minimum threshold as provided for in the regulations. Broadcasters are expected to produce their own programmes considering their own individual licence terms and conditions.

[24] **“Simulcast”**. The definition thereof is to be found in the DSB Regulations.

Simulcast: *“means a simultaneous transmission of the same sound broadcasting service on two or more channels or media.”*

[25] Below is the context in which the term is used:

Regulation 4(2) of the Digital Sound Broadcasting Regulations provides as follows:

“On a date to be determined by the Authority and published in the Government Gazette, existing sound broadcasting services may simulcast their existing sound broadcasting programme(s) on analogue and digital platforms.”

[26] There is yet another definition of simulcast found in Mobile TV Regulations:

Simulcast: *“means the simultaneous transmission of content in multiple platforms.”*

[27] Context in which the term is used:

Regulation 7(b) of the Mobile TV Regulations 2010 provides the following:

“The provider of DTT Satellite and Cable television services who choose to simulcast their content via mobile devices, will not require authorization.”

[28] Therefore, from the above definitions simulcast can be referred to as simultaneous transmission of the same broadcasting service on two or more media/platforms. A few examples are set out hereunder.

28.1 Example 1: Radio Station A broadcast its services on both terrestrial and satellite platforms simultaneously.

28.2 Example 2: Radio Station B broadcast its services on FM and AM platforms simultaneously.

28.3 Example 3: Radio Station C broadcast its services on DTT and analogue platform simultaneously.

28.4 Example 4: Radio Station D broadcast its services on FM and simultaneously streams the services on the internet.

[29] Counsel for the Complainant and counsel for the Respondents duly made their submissions on the write up by the Licensing and Compliance Division. Nothing in the submissions can be interpreted as disagreeing with the definitions as well as the examples provided.

[30] The definition of the two concepts, shows that syndication and simulcast in broadcasting are completely different. The key words in **"programme syndication"**, are *"programmes produced by one source", "shared and broadcast on two or multiple radio stations or licensees"*. On the other hand, **"simulcast"** happens when, for example, a station has a *"transmission of the same broadcasts service"* simultaneously *"on other platforms or channels"*. A good example given was streaming a sound broadcasting service on the Internet.

THE ROLE PLAYED BY ICASA

[31] Although the definition of "programme syndication" in the Community Broadcasting Regulations apply only to Community Broadcasters, there is no reason why it cannot be used as a guide in the present instance.

After all, the rationale behind the regulation seems to be to encourage broadcasters to produce their own programmes. The Licensing and Compliance Division confirmed that broadcasters are expected to produce their own programmes.

[32] When considering that ICASA's legal mandate is to regulate the broadcasting industry "*in the public interest*", there seems to be no reasonable basis why the term "*programme syndication*" should be ascribed a different meaning when applied to different tiers of broadcasting. Essentially, the notion of "*public interest*" demands that ICASA carries out its functions fairly and impartially irrespective of whether the broadcaster concerned is a public, private or a community service.

[33] Another reason why it is highly unlikely that the Community Broadcasting Regulations and Regulations for Commercial Broadcasters would *have different definitions for "programme syndication"* is that the minimum threshold of 20% or 45% allowed for programme syndication in Community Broadcasting Regulations, is the same threshold that applies in terms of the Standard Terms and Conditions for Individual Licensees Regulations. In any event, one of the aims of such a regulation seems to be to ensure that there is content diversity by all broadcasters.

[34] Furthermore, there is the version of the Respondents which, though it does nothing to advance the case of the Respondents, cannot simply be ignored. [I shall return to this later].

[35] From the explanation given by the Licensing and Compliance Division, it appears that ICASA will not get involved in commercial arrangements between broadcasters except for ensuring that the arrangements concerned are not to the detriment of the public interest.

[36] According to the Licensing and Compliance Division of ICASA, where there is an agreement to share programmes, the Division is usually advised at a later stage once the arrangements have been finalized. Once the Division has been so advised, it will need to verify that the sharing of programmes does not go beyond the threshold of 20% as outlined in the Community Regulations or 45% in terms of the Covid 19 Regulations, whichever is applicable.

[37] On the basis of the abovementioned, sharing/networking and or syndicating programmes, viewed collectively, should not exceed the maximum threshold as provided for in the regulations.

IS WHAT THE RESPONDENTS ARE DOING SIMULCASTING?

[38] The definition of "simulcast" is simple and to the point. It cannot be said, by any stretch of the imagination, that what the Respondents are doing is simulcasting. LM Radio and Magic FM are not channels or platforms. They are radio stations and licensees. One of them is producing content that is broadcast by both of them.

[39] Significantly, it was the Respondents' defence that served to strengthen the allegations against them. This was so because the Respondents did not unequivocally deny that LM Radio and Magic 828 are broadcasting the same programmes simultaneously. The high water mark of their case was that what they were doing was "simulcasting" - a term they made no attempt to explain. They also made no attempt to deny that this programme sharing exceeded the required limit of either 20% or 45%. Instead, they were content to state that they were simulcasting "a section" of their programmes to save costs. In my view, this was a deliberate attempt to avoid the very crucial question we had to determine as the CCC. The only reasonable inference, therefore, was that, in the present case, programme syndication exceeded the required limit of 20% or 45%.

[39] There was also a question of whether the period over which the non compliance took place should be measured within the performance period of 5h00 to 23h00 or over a broadcasting period of 24 hours. It is a fact that ICASA measures the performance of Licensees during the performance period, that is, from 5h00 to 23h00 and not on a 24 hour period. The correct measurement, therefore, should be from 5h00 to 23h00.

INADEQUACY OF THE RESPONDENTS' DEFENCE

[40] There is no principle of interpretation that requires a court without more to interpret one piece of legislation with reference to another.

This is because a special meaning given to a word or expression in one statute may not be assigned to the same word or expression in another statute which does not define that same word either at all or in the same manner. In other words, it is impermissible in law to seek to interpret a word in one piece of legislation through the prism of a special meaning ascribed to it in another. That, however, does not mean that the definition can be ignored. As said earlier, it can be used as a guide.

[41] In the present case both LM Radio and Magic 828 are commercial radio stations. The indiscriminate use, in a commercial context, of a definition of "*programme syndication*" found in the Community Broadcasting Regulations, would not have been proper. Nonetheless, we were assisted, among others, by looking at the ordinary meaning of the phrase "*programme syndication*" to make a finding.

[42] It is also important to note that a determination of whether there has been non-compliance or not would never be made solely on the definition of one word or phrase. This is so because a determination

of an issue is never made on the basis of individual facts or pieces of evidence viewed in isolation. Rather it is the evidence as a whole that matters. This would include not only the allegations against the Respondents but also the response to such allegations.

[43] As stated earlier, in the present case, the Respondents spent more time in their papers explaining why they were doing what they were doing and failed to be candid with the CCC as to what exactly they were actually doing. This left a distinct impression that the Respondents' case was indefensible. And counsel for the Respondents, in her submissions, did nothing to dispel that impression.

[44] The fact that the Respondents put up a weak defence, served only to confirm the facts as alleged. A defence that says "*What I am doing is not "X" but "Y,* without any attempt to elaborate on that statement, is a bald denial that cannot add anything to the Respondents' case.

[45] In any event, what carries more weight, in our view, is what the Respondents **are actually doing,** rather than what **they say they are doing.** Notably the Respondents did not and could not deny that they were broadcasting the same content at the same time for over 90% of the broadcast period.

CONCLUSION

[46] The Respondents were properly informed of the case they had to meet. So they could not have had an excuse for failing to prepare a proper defence. There was sufficient and credible evidence in the form of an affidavit from Matthews. Serious allegations of non-compliance were made with dates and times and the extent of the non-compliance were meticulously set out. Yet no proper response or evidence in rebuttal from the Respondents was forthcoming, save a mere bald denial.

[47] In addition, press statements by the Respondents, which they themselves referred to in their papers, served as confirmation of non-compliance.

FINDING

[48] From the totality of the evidence, the CCC has come to the following conclusion:

48.1 The complaint that the Respondent has failed to comply with section 4(9) of the ICT COVID-19 Regulations in that LM Radio and Magic 828 are syndicating their programmes to one another, at a percentage that is more than 45% **is upheld.**

ORDER

[49] In terms of section 17D (2), the CCC makes the following recommendations to be issued by ICASA namely:

49.1 direct the Licensees, LM Radio and Magic 828, to desist from any further contravention of the ICT Covid Regulations as read with the Standard Terms Regulations, in terms of section 17E (2)(a) of the ICASA Act; and

49.2 direct the Licensees to pay a fine of R30,000 of which R15,000 is suspended for three years, within 30 days after ICASA has published its decision.

TMMasipa

11 March 2022
Date: _____

Judge Thokozile Masipa
CCC Chairperson

