

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 17 August 2016

CASE NUMBER 203/2016

IN RE: SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD

PANEL: Prof JCW van Rooyen SC
Councillor Nomvuyiso Batyi
Mr Jack Tlokana
Ms Mapato Ramokgopa

From the SABC: Ms N Monyela (Manager Policy & Regulation), Mr N Shibambo (Acting Manager: Regulatory Compliance), Mr A Matthee (Commercial Enterprises) and Mr Y Mohamed (Manager: Commercial Enterprises)
From Broadcasting Compliance ICASA: Ms Fikile Hlongwane (Manager) and with her Mr T Tleane from the Legal Department (ICASA)
Acting Coordinator: Ms Meera Lalla (Attorney)

JUDGMENT

JCW VAN ROOYEN SC

THE CONTRAVENTION

[1] The South African Broadcasting Corporation is a broadcaster which is provided for in section 8 and further of the Broadcasting Act 1999. It provides

¹ An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to 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 whether complaints (or internal references from the compliance division or inspectors at ICASA) which it receives against licensees in terms of the Electronic Communications Act 2005 or the Postal Services Act 1998 (where registered postal services are included) are justified. Where a complaint or reference is dismissed the matter is final and only subject to review by a Court of Law. Where a complaint or reference concerning non-compliance is upheld, the matter is referred to the Council of ICASA with a recommendation as to sanction against the licensee. Council then considers a sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council's imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

for television and radio on a national scale. Radio Sonder Grense (“RSG”) is one of its channels which provides a national radio service in Afrikaans, one of the eleven official languages in South Africa. Section 56 of the Electronic Communications Act 36 of 2005 (“ECA”) provides that “A party election broadcast and a political advertisement must not be broadcast on any broadcasting service except during an election period and then only if, and to the extent authorised by the provisions of sections 57 and 58.” Section 58(6) of the ECA provides that “no political advertisement may be broadcast later than 48 hours prior to the commencement of the polling period.” The polling period commenced at 07:00 on the 3rd August 2016. The Broadcasting Compliance Unit at ICASA referred the following alleged contraventions of section 56 read with section 58 of the ECA to the Complaints and Compliance Committee: that the SABC, through its RSG service, broadcast three political advertisements for the Freedom Front Plus, a registered political party, within the 48 hours before the polling period commenced on the 3rd of August.

[2] At the hearing of this matter the representatives from the SABC conceded that the SABC had contravened section 58(6) of the ECA. It was common cause that an administrative error had led to the contravention. It was pointed out that the SABC deals with more than 300 advertisements per day and that the broadcast of advertisements mostly takes place by way of an automated system. An error in the initial scheduling led to these contraventions.

[3] The Constitution of the Republic of South Africa 1996 guarantees free and fair elections,² a phrase which has been emphasised by the Constitutional Court as a cornerstone of our new democracy.³ The main purpose of sections 56, 57, 58 and 59 of the ECA is to ensure that political parties have an *equal* opportunity in broadcasting their political advertisements. The equality principle was not upheld by the SABC by not ensuring that no political advertisements would be broadcast within the 48 hours before the polling commenced at 07:00 on the 3rd of August. It is, accordingly, not acceptable to look at the results of the election and then argue that the Vryheidsfront Plus, in any case, did not do well - as the

² Cf. section 19 of the Constitution of the RSA: (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

³ See *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); *DA v ANC* 2015 (2) SA 232 (CC).

SABC did at the hearing. The reality is that a particularly wide ambit of free speech is permitted in these election advertisements – as demonstrated well by the Constitutional Court in its judgment concerning the acceptability of an SMS message sent out by the Democratic Alliance in the previous General Election.⁴ The contravention, especially at this very late stage of the election period – in fact within the forbidden 48 hours – was particularly serious. Particular care is expected of a broadcaster in regard to these 48 hours. And this was lacking on the side of the SABC. In fact, one would expect that the warning lights should have been on and that extreme caution would have been taken to ensure compliance.

[4] The conclusion which the CCC has reached is that the SABC was grossly negligent in not having taken sufficient precautionary measures in regard to the forbidden 48 hours. It, *in effect*, gave preference to a political party in a period when fairness was crucial.

ORDER PROPOSED

[5] As to sanction the usual guidelines and possibilities as set out in section 17E (1) and (2) of the ICASA Act would apply. I quote the full section for the sake of convenience:

- (1) When making a decision contemplated in section 17D, the Authority must take all relevant matters into account, including -
 - (a) the recommendations of the Complaints and Compliance Committee;
 - (b) the nature and gravity of the non-compliance;
 - (c) the consequences of the non-compliance;
 - (d) the circumstances under which the non-compliance occurred;
 - (e) the steps taken by the licensee to remedy the complaint; and
 - (f) the steps taken by the licensee to ensure that similar complaints will not be lodged in the future.
- (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[not] 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 -

⁴ See previous footnote, where a minority judgment (by three Justices) in the DA judgment even regarded the material as false – concurring with the decision of the Electoral Court when it decided against the DA.

- (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 communications 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.

[6] In the light of section 17E(1) of the ICASA Act it is of particular importance that although there was no evidence of intentional contraventions, the degree of negligence can be described as gross. The last 48 hours before polling commences is crucial and substantial care should be taken by a broadcaster to ensure that no political advertisement is broadcast during the said 48 hours. The SABC did not abide by this very important legal rule. The constitutionally required fairness of the municipal election was placed at a grave risk and the sanction imposed by Council must send out a warning for the future. A fine should, accordingly, be imposed. However, section 56 of the ECA, read with section 58, does not explicitly prescribe a fine. Section 17E(2) of the ICASA Act must, however, be read with section 4(3)(p) of the ICASA Act which (as amended from 2 June 2014) provides as follows:

(p) except where section 74(1) of the Electronic Communications Act applies, (the Authority) must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

Section 56 of the ECA, read with section 58 is, indeed, an instance where no penalty in the form of a fine is prescribed. The CCC, in its advice on sanction to Council, believes that a fine would be appropriate in this instance. A substantial fine will send out a message that the contravention was serious.

[7] Having regard to section 17H of the ICASA Act, a wide variety of *maximum* fines are prescribed, ranging from R5 million, R1million to R500 000. Of course, these fines pertain to criminal law and, when one considers the contraventions, prescribed for particularly serious offences. The present contraventions also deal with a serious matter and a message must be sent out that Parliament especially declared the said 48 hours as a quiet zone, within which voters could finally make up their minds – in so far as it is relevant for such voters – to vote for a specific candidate. The contravention was, however, not intentional in the

sense that the SABC realised that it was contravening section 56 read with section 58 of the ECA. The SABC should, as the national broadcaster, set an example of compliance to all broadcasters. These contraventions placed its professionalism at stake. The SABC must clearly apologize⁵ for its contravention on air twice, which, in media circles, is regarded as a substantial sanction. To that must be added a fine, the largest part of which is suspended since the contraventions were not intentional.

[8] As to **sanction**, the CCC advises that Council makes the following order:

(1) That the SABC, in its 07:00 news bulletin as read on Radio Sonder Grense, states as follows as a first item for five consecutive mornings: (This must be done within seven days from when this judgment reaches it):

Die Klagtekomitee van die Onafhanklike Kommunikasie Owerheid van Suid-Afrika het bevind dat die SABC die Elektroniese Kommunikasiewet oortree het. Die SABC het binne die 48 uur tydgleuf voor die Munisipale Verkiesing , drie politieke advertensies van die Vryheidsfront Plus op RSG uitgesaai. Politieke advertensies word gedurende dié tydgleuf verbied deur die gemelde Wet. Die Raad van die Onafhanklike Kommunikasie Owerheid het die sanksie wat die Klagtekomitee aanbeveel het aanvaar en beveel dat die SABC op sy RSG nuusdiens, as eerste item om 07:00, vir vyf dae agtereenvolgens, verskoning maak vir hierdie oortreding. Hiermee bied die SABC dan ook sy opregte verskoning aan vir die ernstige oorsig.

[Translation: The Complaints and Compliance Committee at the Independent Communications Authority of South Africa has found that the SABC had contravened the Electronic Communications Act. The SABC broadcast three political advertisements of the Freedom Front Plus on RSG within 48 hours before the polling period for municipal elections commenced. Political advertisements are prohibited during the said 48 hours. The Council of the

⁵ As to the legal permissibility of apologies, see *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) where the Constitutional Court held that a Court may order an apology for the infringement of the right to dignity. Section 17E(2)(c) of the ICASA Act accommodates an apology as a *remedy*: “(c) direct the licensee to take such *remedial* or other steps [not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;” (accent added)

Authority accepted the sanction which the Committee recommended and ordered the SABC to broadcast, as a first item on its 07:00 news service for five consecutive days, an apology for this contravention. The SABC hereby sincerely apologizes for this serious oversight.]

(2) That the SABC pays a fine of R50 000 to ICASA, R35000 of which is suspended for three years.

(3) The condition of the suspension of R35000 is that the SABC is not found to have been in contravention of section 56 read with section 56(8) of the Electronic Communications Act by the Complaints and Compliance Committee at ICASA within the next three years – this period running from 1 December 2016 up to midnight 30 November 2019.

(4) That the above mentioned fine of R15000 be paid to ICASA on or before 2 January 2017.



JCW van Rooyen SC

10 September 2016

Chairperson of the CCC

Councillor Batyi and Members Tlokana and Ramokgopa concurred with the judgment on the merits and order advised to Council.

