

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 5 August 2016

CASE NUMBER 202/2016

IN RE: RHODES MUSIC RADIO

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

From Broadcasting Compliance, ICASA: Ms Fikile Hlongwane and with her Mr Tom Tleane (Legal)

From Rhodes Music Radio: Mr Raymond Mojapelo (Manager)

Acting Coordinator: Ms Meera Lalla (Attorney)

JUDGMENT

Prof JCW van Rooyen SC (Chairperson)

[1] The Broadcasting Compliance Unit at the Independent Communications Authority of South Africa (“ICASA”) referred an alleged

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.

contravention of the Broadcasting Code² by Rhodes Music Radio (“RMR”) to the Complaints and Compliance Committee at ICASA. RMR, in the normal course, falls under the jurisdiction of the Broadcasting Complaints Commission of South Africa (“BCCSA”). However, in accordance with the 1995 recognition conditions by ICASA³ of the BCCSA, all election complaints resort with the Complaints and Compliance Committee at ICASA. In this respect regulation 13 of the Code of Conduct for Broadcasting Service Licensees Regulations provide as follows:

13. During any election period, as defined in the ECA, sections 56, 57, 58 and 59 of the ECA and regulations issued in terms thereof apply. The first question will be whether the complaint can be classified as an election complaint.

It should be pointed out that not the whole Code of Conduct as administered by the CCC applies during an election period. Only the above sections of the ECA and regulations made in terms thereof apply. We will get back to that.

[2] The Broadcasting Monitoring Unit filed the following alleged contravention with the Coordinator of the CCC:

1. The Licensee has contravened regulation 11 (2), which provides as follows:

"Comment must be an honest expression of opinion and must be presented in such manner as that it appears clearly to be comment, and must be made on facts truly stated or fairly indicated and referred to" in that a presenter said the following on air:

² Which is, for purposes of application by the CCC, in Regulations – whilst the BCCSA Code, which is identical in basic content, is in the form of a Code, which forms part of a contract between the BCCSA and the National Association of Broadcasters and was approved by ICASA in 2010.

³ Then the Independent Broadcasting Authority in terms of 1993 legislation, which was substituted by the ICASA Act 13 of 2000

- (a) *"...Something very illegal that I witnessed in Grahamstown and I'm gonna call out the political party for what they did. I saw ANC people, ANC members putting posters on top, on top of EFF posters and this is a huge no, no in the IEC. But the IEC won't do anything about it because we all know that the IEC is technically ANC deployed cadres. I will say it: I will call it out just now because we know the truth".*
- (b) *"Thuli Madonsela is stepping down in October..... It's obvious, I feel like it's obvious there is no way that the ANC is gonna make another decision to put a completely ethical person who is actually going to be exposing people all willy nilly like Thuli Madonsela was doing. Anyway, we will see..."*
- (c) *"..... and yah we hope we are wrong but the thing is we probably know we are not because we know how your boys in the ANC operate"*
- (d) *"anyway the biggest surprise is gonna be the municipal elections and all you people go and vote for the ANC again ... I don't know, anyway moving on to some stories in PE....11*

[3] There is no doubt that the broadcast pertained to the municipal elections and that the broadcast took place during the election period, which commenced on 23 May and ended 48 hours before the polling commenced on the 3rd of August.

[4] On 28 July 2016, the Broadcasting Compliance Unit presented the allegations of a contravention to the licensee alerting it that the comments were in violation of regulation 11(2) of the ICASA Code of Conduct for Broadcasting Licensees - Regulation, Gazette No 32381, 6 July 2009.

[5] The Licensee responded as follows:

"Dear Fikile, this email is to confirm that the letter was received and its contents understood. I must also confirm that the matter was picked up and in process of being dealt with accordingly. However, we will await the word from the

complaints and compliance unit".

[6] Clause 11(2) of the ICASA Code of Conduct for broadcasters, which should be read with clause 11(1), provides as follows:

- (1) Broadcasting service licensees are entitled to broadcast comment on and criticism of any actions or events of public importance.
- (2) Comment must be an honest expression of opinion and must be presented in such manner that it appears clearly to be comment, and must be made on facts truly stated or **fairly** indicated and referred to. (emphasis added)

[7] So as to determine whether the charge was laid under the correct regulation, a closer look at regulation 13 of the CCC Code is necessary. It is necessary to quote the regulation again:

13. During any election period, as defined in the ECA, sections 56, 57, 58 and 59 of the ECA and regulations issued in terms thereof apply.

It is necessary to interpret the words: "regulations issued in terms thereof". The Regulations to which reference is made, clearly refer to regulations which specifically pertain to elections. An example of that would be the ICASA "Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters In Respect of Municipal Elections Broadcasting." The said regulations clearly relate to municipal elections and sections 56, 57, 58 and 59 of the ECA. A clause of the Broadcasting Regulations applied by the CCC in the ordinary course is, accordingly, not applicable to an election complaint. The first question is, accordingly, whether the complaint can be classified as an election complaint. This is, no doubt the case. The comment by the presenter of RMR clearly refers to the municipal elections. The charge should, thus, have been laid in terms of section 59 of the ECA, which provides as follows:

59. Equitable treatment of political parties by broadcasting service licensees during election period

- (1) If, during an election period, the coverage of any broadcasting service extends to the field of elections, political parties and issues relevant thereto, the broadcasting services licensee concerned must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties **equitably**.
- (2) In the event of any criticism against a political party being levelled in a particular programme of any broadcasting service -
 - (a) without such party having been afforded an opportunity to **respond** thereto in such programme; or
 - (b) without the view of such political party having been reflected therein, the broadcasting services licensee concerned must afford such party a **reasonable opportunity** to respond to the criticism.(emphasis added)

[8] Nevertheless, at the heart of both the above section 59 and clause 11 of the Code of Conduct under which the charge was made, lies fairness and it would not be irregular and amount to *adding*⁴ a charge to adjudicate this matter in terms of section 59, as it should be done.

THE MERITS

[9] It is undoubtedly clear that the rules of fairness, which includes granting a reasonable opportunity to respond, were not abided by in the broadcast. Even if the observation as to the placing of election placards were true, the task of a broadcaster is to never be partisan on matters of public interest. Public interest does, of course, not mean that which is interesting to the public. It deals with matters that lie at a higher level, as is clearly pointed out by the Judges and author quoted in the footnote.⁵ Before making the critical observation about the EFF election

⁴ The principle is well illustrated by the judgment of the Supreme Court of Appeal in *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA). See the CCC judgment in *Integrat* (112/2015) where this principle was applied.

⁵ See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A) Corbett CJ said in delivering the majority judgment (at 464C-D): “(1) There is a wide difference between what is interesting to the public and what it is in the public interest to make known . . . (2) The media have a private interest of their own in publishing what appeals to the public and may increase their circulation or the numbers of their viewers or listeners; and they are peculiarly vulnerable to the error of confusing the public interest with their own interest...” Quoted with approval by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly*

placards being pasted over by the ANC, the presenter should have assured that the ANC's local representative was asked for his or her comment. This was not done and amounted to a substantial breach of section 59(2)(a) of the ECA.

[10] In so far as the reference to the appointment of the successor to Adv. Madonsela, the Public Protector, is concerned, the broadcast is, indeed, defamatory of whoever assists in the appointment of the successor. Defamation was, however, not part of the charge before us. However, section 59(2) of the ECA is clear:

(3) In the event of any criticism against a political party being levelled in a particular programme of any broadcasting service - (a) without such party having been afforded an opportunity to **respond** thereto in such programme;

It is not in dispute that no such attempt was made by the radio station.

[11] In the result we have no doubt that section 59 of the ECA was contravened by the Radio Station. The Radio Station – and ultimately the licensee - must take responsibility for its presenters and, accordingly, any order the CCC advises the Council of ICASA to make, will be against the licensee.

[12] The radio station, as represented by Mr Mojapelo, who is in the services of Rhodes University at Grahamstown, conceded that there had been a contravention and apologized profusely. The management of the station had already taken steps soon after the broadcast and discussions were held with the particular presenter.

[13] Given the clean record of the radio station, which is in fact the oldest student radio station in the country, the CCC has decided to not advise

Mail 1994 (1) SA 708 (A) at 779 and Hefer JA in *National Media Ltd v Bogoshi & Others* 1998(4) SA 1196(SCA) at 1212 where reference is made to Asser *Handleiding tot de Beoefening van het Needelands Burgerlijk Recht* (9th Ed vol III at 224 para 238 which, translated, reads as follows: "In practice the public interest is especially employed in matters concerning views expressed via die printed media and television: public interest is, within this context, based on freedom of expression, as guaranteed by the Constitution and by treaties, to expose alleged abuse (and or evil in society). In deciding whether the defence of public interest was lawful usually depends on a balancing of interests – the outcome of which is dependent on the facts of each case.

Council to impose a fine. However, the following statement must, it is advised to Council, be broadcast by the station:

“The Independent Communications Authority of South Africa has directed Rhodes Music Radio to apologize for having broadcast, during the election period, a commentary by one of its presenters which was in conflict with the rules that applied during the election period. The commentary amounted to a scathing attack against the ANC without having granted the ANC an opportunity to respond.

Rhodes Music Radio agrees that the broadcast was in conflict with the law and profusely apologizes to the African National Congress, the Independent Electoral Commission, listeners and ICASA for the contravention - a contravention which would also, in a non-election period, have amounted to being in conflict with the Broadcasting Code. The commentary was not authorised by Rhodes Music Radio and it distances itself from the opinions expressed. However, it takes full responsibility for what was broadcast.”

ADVICE TO COUNCIL AS TO SANCTION

(a) That Rhodes Music Radio broadcast at the beginning of the same broadcasting slot as the slot during which the critical statements were made the statement printed above.

(b) That the above broadcast takes place within seven days after this judgment is sent to the Radio Station and that it be **repeated** on the following day in the same slot and at the beginning of the slot.

(c) That the Manager of the station, Mr Mojapelo, reads the statement and also states that he is the manager of the radio station.

(d) That an electronic copy of the statement be sent to the Coordinator of the CCC within 48 hours after the second broadcast.



Prof JCW van Rooyen SC

10 August 2016

The Members agreed with the finding and the advice to Council.