

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date heard: 5 March 2020

CASE NR: 357/2019

In the matter of **RHYTHM FM (Pty) Ltd**

Referred by COMPLIANCE AND CONSUMER AFFAIRS ICASA

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)
Councillor Dimakatso Qocha
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

On behalf of the CCA: Ms B Mashigo (Manager) accompanied by Ms F Hlongwane (Senior Manager)

On behalf of RHYTHM FM: Mr L Pierce from Phukubje Pierce Masithela Attorneys

From the Coordinator's Office: Ms. Xola Mantshintshi

Coordinator of the CCC: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN[1] RHYTHM FM (Pty) Ltd, a Sound Broadcasting licensee, was referred to the Complaints and Compliance Committee ("CCC") at the Independent Communications Authority of South Africa ("ICASA") on the

¹ The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal in terms of section 33 of the Constitution has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such judgments are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from e.g. the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the ICASA ACT 2000, Electronic Communications Act 2005, Broadcasting Act 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 an order against the licensee. Council then considers an order 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. .

instruction of the then General Manager of the Compliance and Consumer Affairs Division (“CCA”) at ICASA. She informed the Licensee that the matter would be referred to the CCC on 13 June 2019. The ground for the reference was the alleged contravention of Regulation 5(1) and 5(2) of Schedule 1 of the 2010 Standard Terms and Conditions for Individual Licences as amended in 2016.² That would, of necessity, include regulations 5(3), which is also alluded to hereunder.

[2] Regulation 5 as amended in 2016 provides as follows:

5. Commencement of operations

- (1) A Licensee must commence operation of the Broadcasting Service specified in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) twelve months from the date of issue in respect of free to air sound BS;**
 - (b) ...
 - (c) ...
- (2) A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**
- (3) An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**
- (4) ...
- (5) ...

[3] Regulation 14 as amended in 2016 provides as follows:

Contraventions and penalties

- (1) Any person that contravenes regulations 6, 7, 9, 10 and 12 is liable to a fine not less than R100 000, 00 but not exceeding R5 000 000 or 10% of the Licensee’s annual turnover

- whichever is the greater - for every day or part thereof during which the offence is continued.

² GNR.523 of 14 June 2010: Regulations: Standards terms and conditions for individual licences (Government Gazette No. 33294) as amended by Notice 158, published in Government Gazette 39875 dated 30 March 2016 and Notice 699, published in Government Gazette 40372 dated 26 October 2016.

- (2) Any person that contravenes any other regulation, not specified in sub-regulation (1), **except regulation 5**, is liable to a fine not less than R10 000, 00 but not exceeding R100 000, 00.
- (3) A person found guilty of a contravention in terms of sub-regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.
- (4) **Failure to commence with operations in terms of regulation 5 will result in the revocation of a licence. (Emphasis added)**

[Reg. 14 substituted by Gen N 158/2016]

[4] Ms Mashigo, Manager of the CCA, argued that despite a formal extension granted and despite the Division having shown appreciation for the reasons put forward for the further lapse of time, the CCA, as instructed by the then General Manager, referred the matter to the CCC. The General Manager, in correspondence with RHYTHM FM referred to Regulation 5 of the Standard Terms and Conditions for Individual Licences 2010 as amended in 2016. Four years had gone by and, despite the extension granted, RHYTHM FM had not commenced broadcasting within the prescribed time limit, as set out in the Regulations. It is true that it has commenced to broadcast music and identified the station on air as required. The said broadcast cannot, in law, be regarded as “broadcasting” since it would circumvent the law by way of an obvious superficial mechanism: in fact, the often quoted legal adage “*plus valet quod agitur, quam quod simulate concipitur*”³ applies. Translated, it means that the

³ Thus Innes CJ stated as follows in *Zandberg v Van Zyl* 1910 AD 302 at 309: Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is: not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable,

Law is not blind to mechanisms which attempt to circumvent the law. On the other hand, the *audi alteram partem* rule⁴ is a fundamental requirement of our law and thus, RHYTHM FM also had to be heard before a decision could be arrived at by the CCC. Ultimately, RHYTHM FM's view at the hearing was that it would need eight months to get on air. It was stated that it could reach parts of its audience at this stage, but that that would affect the station's strategy to commence its broadcast for all its areas on the same date. It also needed time to provide training to presenters and other employees. Further, it is also dependent on grants. Giving evidence, the Managing Director stated that the mere fact that this matter (and that of BEAT FM) had been referred to the CCC has created concerns amongst its donors and investors. It was, however, not denied that the CCA had reason to refer the matter to the CCC.

[5] The undersigned requested the parties, after the close of the proceedings, whether the charge should not have been brought under the unamended 2010 regulations, since the Broadcasting licence had been issued before the 2016 amendments to the Regulations were made. Both parties agreed that the essence of the matter relates to what took place after the 2016 amending Regulations were published. The CCC has, thus, agreed that the 2016 amended Regulations are applicable. Gratitude is expressed to the Representatives of the parties to this matter for the expertise and speed within which the request for argument in this regard was responded to.

[6] Once again, Regulation 5, as amended in 2016, is quoted.

which differs from the simulated intention. *For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.*' (accent added)

⁴ "Hearing the other side"

5. Commencement of operations

- (1) A Licensee must commence operation of the Broadcasting Service specified in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) **twelve months from the date of issue in respect of free to air sound BS;**
 - (b)
 - (c)
- (2) **A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**
- (3) **An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**

.....

Regulation 14, as amended in 2016, provides as follows:

Contraventions and penalties

- (1) Any person that contravenes regulations 6, 7, 9, 10 and 12 is liable to a fine not less than R100 000, 00 (One hundred thousand Rand) but not exceeding R5 000 000, 00 (Five million Rand) or 10% of the Licensee's annual turnover - whichever is the greater - for every day or part thereof during which the offence is continued.
- (2) Any person that contravenes any other regulation, not specified in sub-regulation (1), **except regulation 5**, is liable to a fine not less than R10 000, 00 but not exceeding R100 000, 00.
- (3) A person found guilty of a contravention in terms of sub-regulations (1) and (2) is liable for an additional fine of R100 000, 00 for every repeated contravention of a regulation in these Regulations.

- (4) Failure to commence with operations in terms of regulation 5 will result in the revocation of a licence.[Reg. 14 substituted by Gen N 158/2016] (emphasis added)

[7] An observation at this stage: it is significant to note that a contravention of Regulation 5 (not commencing to broadcast timeously) does not attract a fine. Failure to commence “will result in the revocation of the licence.” Such revocation has, however, not taken place. It would, in any case, have had to be heard by the CCC, before a withdrawal by Council could take place. A revocation of the licence was also not on the agenda for this hearing. Given the four years that have lapsed since the licence had been issued, the ultimate plea of the CCA at the hearing of this matter was that the CCC advise Council to issue a final date for making the license operational.

BACKGROUND TO THE MATTER BEFORE THE CCC

[8] It is of value to consider the background to this matter as set out by the Managing Director of RHYTHM FM, Mr Given Mkhari, as to the reasons why timelines could not be abided by. Since the explanation is rather lengthy, some lesser important aspects will be omitted.

1. Introduction

- 1.1 RHYTHM FM is owned by a Consortium of individuals and small and medium enterprises, the majority of which are based in the Eastern Cape. The said individuals and SMME’s are new entrants in the Sound Broadcasting sector. MSG Africa Group (MAG), a 100% black owned company operating in the media and communications industry, is a 19.9% shareholder in RHYTHM FM. [In its licence and frequency licences the licensee is described as follows: “Ownership held by persons from historically disadvantaged groups:100%”]

- 1.2 MAG funded the establishment costs of the license application and the initial set up costs prior to securing full approval by the funders.
- 1.3 During the application process and subsequent to securing the Sound Broadcasting and Service Licence for the Eastern Cape, the Consortium set about finalising the terms of indicative funding from Developmental Funding Institutions, namely the Industrial Development Corporation (IDC) and the National Empowerment Fund (NEF).
- 1.4 Both institutions agreed to fund the station with a set number of conditions, key of which was that MAG and its shareholders and directors provide their balance sheet and related security requirements.
- 1.5 Furthermore, MAG was required by the funders to establish a radio focused entity MAG Afrika Broadcasting (MAB), to house their radio broadcasting interests, wherein the NEF would become a 10% ordinary shareholder and then IDC would become a 10% preference shareholder in MAG.
- 1.6 Once the above conditions were met, the IDC and NEF provided funding to MAG with the legal agreement that MAG would further lend to RHYTHM FM and its sister station, BEAT FM, on similar terms that were advanced to MAG.
- 1.7 The reasons for this funding structure was firstly that the funders

were confident of the recoverability of their funds from MAG given the limited balance sheets and security assets of the rest of the Consortium members of RHYTHM FM.

1.8 Secondly, the funders were comfortable to fund a more enlarged business given that they were of the opinion that the Eastern Cape and the Free State markets were too small to individually sustain new entrants in a stagnant economic environment.

1.9 The funders were of the view that the new stations would augment each other while enjoying the support of the existing MAG operated radio stations, namely POWER 98.7 and Capricorn FM. Accordingly cash flows from MAG established stations would be deployed to serve the debt obligations of RHYTHM FM and BEAT FM, thus allowing the new stations ample time and space to gain audience and revenue traction with minimal pressure to service debt obligations in the earlier years.

1.10 Such funds are provided on a financial drawdown basis subject to various performance milestones being met by the new stations to the satisfaction of the IDC and NEF.

1.11 *While the funders and operators understand and acknowledge that the licensees are individual and separate license holders, due to commercial viability considerations, the planned intention had been to launch and operate around a similar period to benefit from their combined scale. For example, contracts with studio and equipment*

providers, signal provision contracts with Sentech, as well as advertising and marketing services were entered into simultaneously to leverage the combined scale of the stations. (emphasis added)

2. The Authority's licensing objectives

2.1 The Authority's decisions to license individual commercial free-to-air sound broadcasting services (I-BS) licences in the geographical markets of Eastern Cape and the Free State Provinces (secondary markets) are consistent with the objectives set out in the Electronic Communications Act. [See section 2 of the ECA, to which the Managing Director referred in some detail and which is left out of this overview]

2.2 The licensee is a new entrant in a secondary market, funded through debt and equity instruments by Development Finance Institutions (DFI). It is not an established player with significant resources, unlike existing players in the market with which it must compete from day one of its operations.

3. Spectrum Amendments required for optimal viability

3.1 From the outset, the RHYTHM FM consortium submitted to the Authority that its application was for the entire Eastern Cape Province. It submitted that while the published map at the time only reflected Butterworth and Umtata, it would upon award, work with both the Authority and Sentech to find a suitable solution for the spectrum limitations in the Province.

- 3.2 Upon award, the licensee commenced engagements with the Authority, with the support of Sentech's technical teams by submitting applications for spectrum amendments, to ensure that its broadcast footprint would cover most, if not all, of the Eastern Cape service area. *The licensee has motivated, eventually successfully, for the increase in the number of transmitters that it may use. (emphasis added)*
- 3.3 *Accordingly, between April 2016 and December 2018, the licensee submitted for various spectrum amendment applications to the Authority.(emphasis added)*
- 3.4 Parallel to the process outlined above, in **August 2016**, RHYTHM FM submitted an application for extension of Commencement Date to the Authority. At the time of the application RHYTHM FM was confident that the Authority would hopefully approve the spectrum amendment applications in the first half of 2017. *(emphasis added)*
- 3.4.1 Upon the Authority granting the extension on **29 June 2017** RHYTHM FM commenced airing music and station identity content while in anticipation of the licensing of additional sites.*(emphasis added)*
- 3.4.2 Initially the proposed Eastern Cape expansion solution comprised additional transmitters at each of Aliwal North, Butterworth, Cradock, Graaff-Reinet, Kareedouw, King

Williams Town, Noupoort, Port Elizabeth, Port St John, Queenstown and Umtata and would have provided a combined coverage over 11 sites.

3.4.3 Engagements were held with the Authority in an effort to mitigate the coverage limitations.

3.4.4 In **March 2018** the Authority licensed six of the eleven proposed sites for reason of interference and/or the frequencies being allocated to other broadcasters already [see/refer to below illustration 1 for approved sites].

Item	Station Name	Code	Freq (MHz)	TxPower (kw)	ERP (KW)	Population coverage
1	Butterworth	C19	94.3	5	76	316 463
2	Graaff-Reinet	C25	89.3	3	30	30 198
3	Kareedouw	C7	99.4	1	20	48 454
4	Port Elizabeth	C8	93.8	2	31.7	619 934
5	Queenstown	C27	104.2	3	36	184 851
6	Umtata	C29	95.2	5	47.8	635 039

Illustration 1: Approved by March 2018

3.4.5 *The Licensee noticed that the additional licensed sites precluded the critical East London and its surrounding areas. The Licensee was particularly concerned about non-coverage in East London, as a major economic hub of the Eastern Cape. RHYTHM FM's broadcast studios are based in East London and were already complete at this stage. (emphasis added)*

3.4.6 RHYTHM FM conducted further technical tests with Sentech

and continued to seek the cooperation of the Authority's engineering team.

3.4.7 Key management members such as Mr Putco Mafani were already in the employ and payroll of the station, having resigned from the SABC.

3.4.8 Following the revisions by Sentech, RHYTHM FM submitted another application for spectrum amendment in **December 2018**, to ensure the coverage area includes the East London site, the home of the Licensee where its offices and studio are located.

3.4.9 *It is now common cause that the December 2018 application was approved by the Authority on **9 July 2019**.(emphasis added)*

4. Funders and Shareholders' considerations

4.1 As described above the Licensee has been consistent in demonstrating its commitment to introducing a new entrant in the Eastern Cape in line with its application to the Authority.

4.2 Experience has shown that a "false start" can "burn cash", alienate audiences and advertisers and delay or frustrate the ability of a broadcaster to become viable in a competitor market. The new entrant must launch with the best possible chance to succeed.

- 4.3 The depressed economic environment in South Africa has further heightened the need for financial prudence, particularly for emerging small to medium enterprises.
- 4.4 *The project does not have space to incur the risk and cost of launching prematurely, by broadcasting to a limited audience in a secondary market while competing with established regional and national commercial operators.* The Licensee is of the considered view that it needs to resume full operations with the best possible chance to secure a viable and sustainable listener base. *(Emphasis added)*
- 4.5 To commence operations in such a competitive market, the Licensee required secured funding from IDC and NEF. However supportive the DFI's are, they nevertheless insist on prudent investing and have insisted on obtained assurances regarding the viability of the Licensee before advancing the full amounts of funding committed to the Licensee.
- 4.6 To this end the IDC and NEC have made it clear that:
- 4.6.1 The funding be advanced to and secured against the assets of one of the Licensee's shareholders, MSG Afrika Broadcasting (MAB), which also holds an interest in RHYTHM FM / RHYTHM FM;
- 4.6.2 MAB demonstrated that it would be able to offer to

advertisers a sustainable portfolio of audiences;

4.6.3 Accordingly, that both RHYTHM FM and BEAT FM demonstrate that their broadcast footprint cover a viable listener base.

5. **Contraventions as stated in charge sheet**

5.1 The Licensee acknowledged having omitted to request *for an Extension of Commencement* for RHYTHM FM [timeously]. This oversight has primarily been due to the Licensee's focus in securing the additional transmission sites to ensure the overall business viability and sustainability.(emphasis added)

5.2 While in 2018 the Authority finally approved additional transmission sites for both RHYTHM FM and BEAT FM, the Licensee's ability to draw down on funding was affected by the pending successful resolution of RHYTHM FM's *East London transmission site*. The Licensee did not anticipate that it would take a while for the Authority to license the East London application.

5.2.1 RHYTHM FM resubmitted an application to amend its radio frequency spectrum license to cover East London on *11 December 2018*.

5.2.2 Acknowledgement of the application was received on 14 January 2019. Subsequently the application was published by the Authority in terms of notice 73 of 2019 in Government Gazette on *15 February 2019*. (emphasis added)

5.2.3 The notice of 15 February 2019 invited interested persons to

submit written representations in relation to the spectrum amendment application within fourteen working days from the date of publication in the Government Gazette, and

5.2.4 ***Algoa FM submitted their objections post the prescribed deadline.(emphasis added)***

5.2.5 7 March 2019 was the prescribed last date of submission. On 8 March 2019 Algoa FM made a representation to which the Licensee submitted a response to the Authority on 13 March 2019.

5.2.6 ***The Authority approved the East London Site on 9 July 2019 for RHYTHM FM. (Emphasis added)***

5.2.7 Shortly after the East London approval, *on 19 July 2019*, the Authority notified the Licensee of proceedings overseen by the Compliance and Consumer Affairs (CCA) in relation to the shareholder's dispute.

5.2.8 **Upon the spectrum license approval for RHYTHM FM in July 2019 by the Authority, the Licensee commenced the process of applying for the financial drawdowns for both RHYTHM FM and BEAT FM from its funders. (emphasis added)**

5.2.9 The shareholders' dispute facilitated through the Authority together with the current enquiry by the CCC raised concerns amongst our investors.

6. **Readiness to launch the broadcasting services**

6.1 To date, R15 620 679.00 has been deployed on RHYTHM FM.

6.2 We have been cautious in not incurring further costs without a clear

view of the launch date.

- 6.3 Our funders and we are concerned about the implications of this CCC enquiry.
- 6.4 We are approaching the December and January downtime which are customary in the South African economy.
- 6.5 In our launch plans we have provided for *2 months of training* and on-air rehearsals prior to going on air.
- 6.6 Our talent recruitment drive is conditional upon finalising a launch date.
- 6.7 Assuming this CCC enquiry being finalised by November 2019, we are confident in being able to *launch full services by May 2020. (emphasis added)*
- 6.8 After all the effort that the Licensee and the Authority has expended in determining an appropriate, if not optimum, coverage area for the Licensee, it is clear that the Licensee is poised to optimally make use of the spectrum allocated to it.
- 6.9 Various stakeholders including shareholders, employees, landlords, suppliers and funders have committed resources to ensure that viable radio service is launched. We have committed to a long term lease with and have deployed infrastructure in studio facilities and equipment.
- 6.10 *The Authority has invested time and resources and sound judgment in awarding the service license and subsequently spectrum licenses to RHYTHM FM. (Emphasis added)*
- 6.11 We remain deeply appreciative of the opportunity that has been afforded to the RHYTHM FM Consortium. *We sincerely regret the inconvenience that has been occasioned by the lapse of time between*

formal issue of our license to date, and remain committed to put all efforts to ensure that RHYTHM FM finally launches a full service with the best chances to succeed and that valuable spectrum is efficiently put to use. (emphasis added)

6.12 Given our state of readiness, we humbly submit that no other Licensee can apply better use of the spectrum allocated to us and reasonably launch an alternative service in the broadcast area sooner than RHYTHM FM.

6.13 We have notified our funders about the current proceedings and have impressed to them the urgency of rolling out the final stages of the commencement of the operations to avoid any further similar complaints being lodged against us.

6.14 RHYTHM FM and BEAT FM's financial drawdowns are dependent on their combined commercial viability and compliance certainly. We humbly request the Authority to finalise the current enquiry.

Signed: *Given Mkhari*

CONCLUSION BY THE CCC

[9] This is one of the matters which demonstrates that, given the intricacies of setting up a radio station – and in this case, over a wide area – the matter cannot simply be addressed by resorting to a strict application of the Regulations. In fact, the approach by the CCA to the matter was pragmatic and equitable – an approach which, in the special circumstances of this matter, was justified. However, it reached a point where the matter had to be referred to the CCC so as to provide direction to the matter and advise Council as to an order.

A further perusal of Regulation 5 is required::

- (1) A Licensee must commence operation of the BS specified in the Licence, within the periods mentioned in the paragraphs below, unless the Authority grants, on good cause shown, an extended commencement period:
 - (a) **twelve months from the date of issue in respect of free to air sound BS;**
 - (b)
 - (c)

- (2) **A request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations.**

- (3) **An extension for the commencement of operations shall only be granted once for a period that does not exceed the period stipulated in sub-regulation (1).**

The sanction for omitting to commence broadcasting is to be found in Regulation 11(4), which provides as follows:

- (4) **Failure to commence with operations in terms of regulation 5 will result in the revocation of a licence.**

No other sanction is prescribed.

It was common cause that no such revocation had taken place - and that could only, legally, have taken place by way of an order by Council on the advice of the CCC. In the process, on 14 September 2016, an additional term to commence broadcasting up to 30 June 2017 was granted to RHYTHM FM. Although the application was not lodged timeously, as prescribed, it was, nevertheless granted. In the process, a number of additional frequencies were also issued by the Authority, as advised by the CCA - including a last one for East London on 19 July 2019. This procedure was time consuming and related to prescribed procedures.

[10] Before the East London frequency was granted, a letter from the General Manager CCA, dated 8 April 2019, required RHYTHM FM to respond to the allegation that it had not commenced broadcasting as prescribed. The Response by RHYTHM FM was not regarded as having provided acceptable reasons for the omission to commence broadcasting. Not long thereafter, the General Manager of the CCA, after an exchange of correspondence, decided to refer the matter to the CCC.

[11] When considering the facts as a whole, it is clear that the CCA – acting on behalf of the Authority – granted an extension to RHYTHM FM. The accentuated words “a request for an extension of the commencement period, in terms of sub-regulation (1), must be brought to the Authority six months prior to the expiry of the commencement of operations” mean that at the latest an application for extension must be filed six months before the one year expires. On **16 August 2016**, seven months after the licence had been issued, RHYTHM FM applied for an extension in terms of Regulation 5 of the Standard Regulations. It was common cause that the CCA, on behalf of the Authority, granted the extension and afforded RHYTHM FM permission to commence operations by 31 July 2017. The application was, of course, late if tested against Regulation 5, but this aspect was not raised at the hearing. Be that as it may, it was the CCA, on behalf of the Authority, that granted the extension - obviously condoning the slightly late application. Our Courts⁵ recognise substantial performance as performance, in any case. It was common cause, however, that RHYTHM FM did not commence broadcasting on 1 August 2017.

⁵ Compare *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).

[12] During **April 2017**, RHYTHM FM further applied to expand its spectrum. In **March 2018**, having applied the prescribed procedure, the Authority, as advised by the CCA, licensed frequency licenses for six of the eleven additional coverage sites that RHYTHM FM had applied for. Since *licensing*, as such, may not be delegated,⁶ the licences were consistently signed by a Councillor or the Chair of Council, as authorised by Council.

[13] This was, however, not the end of the road towards becoming operative: RHYTHM FM submitted an application to amend its radio frequency spectrum license to cover East London on **11 December 2018**. Acknowledgement of the application was received on **14 January 2019**. Subsequently the application was published by the Authority in terms of notice 73 of 2019 in the Government Gazette on **15 February 2019**. The notice of 15 February 2019 invited interested persons to submit written representations in relation to the additional spectrum application within **fourteen** working days from the date of publication in the Government Gazette. *Algoa FM submitted their objections after the prescribed deadline* - 7 March 2019 having been the prescribed last date of submission. On **8 March 2019** Algoa FM made representations to which RHYTHM FM submitted a response to the Authority on 13 March 2019. The Authority approved the East London Site and a frequency licence was issued, signed by the Acting Chairperson of ICASA, on **9 July 2019**.

[14] The CCC was informed that upon the spectrum license approval for RHYTHM FM in **July 2019** by the Authority (East London) RHYTHM FM commenced the process of applying for the financial drawdowns for both

⁶ See section 4(4)(f) of the ICASA Act 2000, as amended. Also see sub-section 4(4)(g) and also (h) and subsection 4(5).

RHYTHM FM and BEAT FM from their funders.

[15] When by the end of **March 2019**, RHYTHM FM had still not commenced operation of the Broadcasting Service, the CCA contacted the licensee in this regard. RHYTHM FM was required to “*clarify the position of the radio station regarding the commencement of operations in line with the Licence Terms and Conditions.*” When an acceptable response was not received the CCA on **2 September 2019** referred this matter to the Complaints and Compliance Committee for an investigation and finding in terms of section 17B of the ICASA Act. A Response from RHYTHM FM was required on or before 26 September 2019. RHYTHM FM was informed by the CCC’s Coordinator that after the Response had been received, the CCA would be afforded an opportunity to Reply to the Response. An application for more time was filed, since the legal representative of RHYTHM FM was abroad. An extension was permitted until 7 October 2019. The Response was filed on 7 October 2019 and the matter was set down for a hearing by the CCC on 5 March 2020.

[16] At the hearing of the matter Mr Mkhari answered a number of questions put to him by Members of the CCC. Whilst conceding RHYTHM FM’s embarrassment at having taking up so much time, he also explained that the undertaking had been an enormous one – especially also having been taken up by its application for more frequency and the importance of adding East London to the frequency spectrum – East London being an important centre for the areas involved. From a publicity and financial perspective it was also important to commence the whole service on the same day.

[17] The CCC has noted the substantial time taken up by the applications for more frequency and ultimately, also, the dispute as to East London, where Algoa Radio opposed the application. It is also of importance that ICASA was still willing to add East London on the 19th July 2019. The issuing of this frequency licence demonstrated that ICASA was willing to widen the licence, which was issued in December 2015, on 19 July 2019. Strictly speaking, Regulation 5 provides that two years would, if an extension is granted, be the maximum time permitted. However, circumstances, especially in the present case with such a wide coverage area and with additional spectrum applications (which, understandably, took time to conclude, given the requirement of advertisement in the *Government Gazette* and a possible hearing of such an application by ICASA), the matter took much more time to conclude than what would have been expected by the Regulator in the normal course.

[18] However, the mere fact that the Council of ICASA, as advised, was prepared to grant the East London a spectrum license on 19 July 2019, whilst it knew that RHYTHM had not commenced broadcasting, demonstrates that it did not apply a strict approach to the time lines in regulation 5. Six additional frequency licences had, in any case, also been issued in March 2018. A spectrum license may, in any case, only be issued to a holder of a Broadcasting license (issued, in this case, in December 2015). Of course, a spectrum licence is not the licence referred to in regulation 5. However, it is undisputed that the Authority was aware that it was issuing additional spectrum licences, pending the commencement of the broadcast over RHYTHM FM's whole geographic area. Wider spectrum was integral to RHYTHM FM's broadcasting plan, so that more communities, as well as East London, could also be reached.

[19] Legally, the only manner that a broadcasting license may be withdrawn is after an inquiry by the CCC and confirmation of the proposed order, if any, by the ICASA Council. A broadcasting licence may, in any case, only be suspended for a month, after previous frequent findings against it by the CCC as confirmed by Council.⁷ In that sense Regulation 11, with its one-year addition rule, is not enforceable without an inquiry by the CCC and an order by Council. The ICASA Act, obviously, is the only legal instrument⁸ in accordance with which a licence may be withdrawn and that is after an inquiry by the CCC and confirmation by Council.⁹ There is further no reason to doubt the legality of the frequency

⁷ See section 17E(2)(d) – footnote 9.

⁸ Of course, in certain circumstances the High Court would also be called upon to set aside a licence.

⁹ **17E. Decision by Authority**

- (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 -
 - (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; (accent added) or
 - (ii) amend or revoke his or her licence; and
 - (e) direct the licensee to comply with any settlement.
- (3) The Complaints and Compliance Committee must submit its finding and recommendations contemplated in subsections (1) and (2) and a record of its proceedings to the Authority for a decision regarding the action to be taken by the Authority within 60 (working) days. (accent added) The CCC has 90 working days to conclude a matter.
- (4) The Authority must make a decision permitted by this Act or the underlying statutes and provide persons affected by such decision with written reasons therefor.

licences issued by ICASA, the last one having been in July 2019. In fact, the basic principle in law is that whatever *might* have been done in conflict with the law, remains valid until set aside – compare the so-called *Oudekraal* judgment of the Supreme Court of Appeal.¹⁰ There is, in the view of the CCC, no reason to set aside any of the frequency licences: firstly it was not part of the matter before the CCC and secondly, there is no reason to believe that there was anything legally remiss in the issuing of these frequency licences. And, of course, time consuming prescribed procedures had to be followed by ICASA in awarding these licences.

[20] The matter must also be considered in the light of the Xhosa speaking communities involved: communities which have a fundamental right in terms of section 9(2) of the Constitution of the RSA and the Broadcasting Act 1999¹¹ to

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at para 26: “The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.” Accordingly, it does not help for MTN to speculate optimistically on whether it may succeed in its High Court review application. Until the review application is determined in its favour, and the award to Vodacom is set aside, the factual existence of the tender decisions stand factually.

¹¹ See section 9 of the Constitution of the RSA; and also the Preamble to the Broadcasting Act 1999: “REALISING that the broadcasting system must reflect the identity and diverse nature of South Africa, is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds, religious backgrounds and official languages in the Republic. Also compare section 9 of the Electronic Communications Act 2005: ¹¹ See section 9 of the Constitution of the RSA; and also the Preamble to the Broadcasting Act 1999: “REALISING that the broadcasting system must reflect the identity and diverse nature of South Africa, is controlled and managed by persons or groups of persons from a diverse range of communities, including persons from previously disadvantaged groups, and must reflect the multilingual and diverse nature of South Africa by promoting the entire spectrum of cultural backgrounds, religious backgrounds and official languages in the Republic. Also compare section 9 of the Electronic Communications Act 2005: (1) Any person may, upon invitation by the Authority, subject to the provisions of this Act, apply for an individual licence in the prescribed manner.(2) The Authority must give notice of the application in the *Gazette* and -(a) invite interested persons to apply and submit written representations in relation to the application within the period mentioned in the notice;(b)include the percentage of equity ownership to be held by persons from historically disadvantaged groups, which must not be less than 30%, or such other conditions or higher percentage as may be prescribed under section 4(3)(k) of the ICASA Act;

rectification in the light of the wracking¹² apartheid past. Furthermore, these communities have the fundamental right to be informed, in terms of section 16 of the Constitution of the RSA.¹³

ADVICE TO COUNCIL

[21] Whatever the alleviating or aggravating circumstances are, it is necessary to advise an order to Council that RHYTHM FM must commence broadcasting. Mr Mkhari put forward that RHYTHM FM needed 8 months from the date that the ICASA order is issued - the reference to the CCC by the CCA having created uncertainty amongst investors and RHYTHM FM's management. The CCA's view was that 8 months would be too lengthy.

It should, with respect, be borne in mind that whatever the Regulations provide in regard to withdrawal of the licence, section 17E of the ICASA Act does not permit a withdrawal of a licence without such advice having been recommended by the CCC and accepted by the Council of ICASA.¹⁴ And, as will be indicated, a broadcasting licence may only be suspended after *frequent* contraventions – and then only for a month. Certain exceptions exist, but these exceptions do not apply to the present matter.¹⁵

¹² President Abraham Lincoln in his Gettysburg Address on Thursday 19 November 1863, commemorating the sacrifice of those from both sides who died at the Battle of Gettysburg during the American Civil War. See Shapiro *The Yale Book of Quotations* (Yale University Press 2006) at 463. Also see Wallis AJ in *Kham v EC* 2016 (2) SA 338 (CC). Since the Address was not written, some versions do not include the word "wrack." Nevertheless, the word "wracked" is in the CCC's view the most fitting word.

¹³ Section 16 of the Constitution

(1) Everyone has the right to freedom of expression, which includes:-

- (a) freedom of the press and other media;
- (b) *freedom to receive or impart information or ideas; (accent added)*

¹⁴ See *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) per Mpati AJ, writing for a unanimous Constitutional Court.

¹⁵ See section 14 of the ECA – where two exceptions are mentioned.

Section 17E(2) of the ICASA Act provides as follows:

- (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 -
 - (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 .

[22] A suspension of the licence would, of course, not be supported by subparagraph (d) since RHYTHM FM has a clean record in the sense that it has not **repeatedly been found guilty of material violations. In any case,** given the fact that the Authority still issued the East London frequency licence on 9 July 2019, it would be inconsistent with such an award (and the previous 6 further awards of frequency licences) to even consider withdrawing the licences – that had been issued.¹⁶ Of course, this is what Regulation 5, in effect, provides. But no action was taken then and, what is more, a broadcasting licence may only be suspended under very special circumstances, as appears from paragraph (d) above as quoted above. Thus, the said 2016 regulation is, in any case, in conflict

¹⁶ The withdrawal of the licence in the matter of In Re Karabo FM (Case 308/ 2018 had to do with exceptional circumstances, where it had become impossible to manage the station in the light of internal management problems.

with the quoted paragraph (d), which has dominance, since it is part of an Act of Parliament.

Advice as to an Order by the Council of ICASA

[23] What would be fitting in the circumstances is to advise Council to issue an order in terms of subsection 17E(2)(c):

- (c) direct the licensee to take such remedial or other steps not¹⁷ in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;

The representatives of ICASA and Mr Pierce, appearing for RHYTHM FM, were in agreement that Council should be advised to issue an order in terms of the section 17E(2)(c) of the ICASA Act. RHYTHM FM put forward 8 months. However, the CCA argued that a term of 8 months would be too long. The CCC decided that 180 days would be reasonable. The ECA provides that “days” means working days *unless* otherwise specified. The CCC has decided that given the long period which has already gone by, it would specify that Saturdays, Sundays and public holidays are included as “days”.

[24]The advice to Council is thus to issue the following order:

[1]RHYTHM FM must commence broadcasting at the latest 180 days (including Saturdays, Sundays and public holidays, but excluding any COVID 4 Lockdown period from the day after the issue of this order.

[2]However, the Council of ICASA, on written application, may grant it more time based on orders or regulations issued in terms of the Disaster Management Act 57 of 2002 which made or are likely to make it objectively impossible to abide

¹⁷ The word “not” is added to the section. There is legal authority that this may be done where a Legislative omission is obvious.

by the 180 days granted to commence broadcasting. Procedures by SENTECH may, in fact, lead to more time becoming necessary.

[3]Any application for more time, must state detailed reasons confirmed under oath as to why as a result of the said Act or Regulations or orders in terms thereof or operational reasons beyond its control it was or will be impossible to comply with the 180 days order.

Such application must reach the Council of ICASA at the latest twenty one days (including Saturdays, Sundays and public holidays) before the term of 180 days expires, unless exceptional circumstances, as stated in detail and under oath by the broadcaster, make it impossible to comply with the 21 days. RHYTHM FM may be called by Council to explain the application further in the presence of the Manager or other representative of the CCA at ICASA.

[4]To order RHYTHM FM to inform, at least fourteen days (which include Saturdays, Sundays and Public holidays) before becoming operational, the CCA Manager per e-mail on which date RHYTHM FM will be operational and provide the Manager within seven working days with an electronic copy of the first or second 24 hours of broadcast and also confirm that all frequencies are operational.¹⁸

[5] To order that the electronic copy referred to in paragraph 4 must be confirmed by way of an affidavit duly signed by the Manager of the broadcaster and duly commissioned by a Commissioner of Oaths.

IMPLEMENTATION PLAN FOR BEAT FM AND RHYTHM FM.

[6]That Council orders the Respondents, BEAT FM and RHYTHM FM, to file a combined and detailed Plan of Action as to how they plan to give effect to the order to be on air within a maximum of 180 days as set out above.

This detailed plan must reach the Manager of the Compliance and Consumer Affairs Division at ICASA within 30 working days from the day after the above order is issued by Council.

The said plan must be updated as to performance every thirty working days thereafter with a final report fourteen working days before launching.

¹⁸ Of course, ICASA Regulations, in any case, require that electronic copies be kept of broadcasts for a term as prescribed.

The implementation plan must be undertaken in the context of the Complaints and Compliance Committee's recommendation to the ICASA COUNCIL that requires BEAT FM and RHYTHM FM to remedy their omission to abide by the term set to commence broadcasting in the 2010 Standard Regulations as amended in 2016, within 180 days (as defined above with possible exceptions with agreement by Council)

The implementation plan is required on the understanding that the additional spectrum applied for by the Respondents and approved by the Authority must enable the parties to launch full Sound Broadcasting Services for both BEATFM and RHYTHM FM within a maximum of 180 days from the day after the issue of this judgment by the Council of ICASA.

THE PLAN MUST CLEARLY REFLECT THE FOLLOWING:

- Objectives in line with the terms and conditions of the Respondents' licences
- Target dates (i.e. start and completion dates)
- Clear delineation of important milestones, including but not limited to the installation of equipment by Sentech, finalisation of equipment testing and dry runs.
- Commitment to and allocating adequate time for taking timeous corrective action for any project disruptions that may occur during implementation.



**JCW VAN ROOYEN SC
CHAIRPERSON OF THE CCC**

23 April 2020

The Members of the CCC agreed