

# COMPLAINTS AND COMPLIANCE COMMITTEE<sup>1</sup>

Date heard: 13 October 2019

CASE Number 348/2019

MAKHASANE

V

LejweleputswaFM (Rock FM)

TRIBUNAL: Prof JCW van Rooyen SC (Chairperson)  
Councillor Nomonde Gongxeka-Seopa  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Dr Jacob Medupe  
Mr Jack Tlokana

The Complainant : In Person

The Respondent: represented by its Board Chairperson

Manager Licensing : Mr Ndhlovu

MrTamsanqa Mtolo assisted by Mr Mr Siyakha Plaatji from the Coordinator's Office

Coordinator: Ms Lindisa Mabulu

---

## JUDGMENT (ONE)

JCW Van Rooyen

[1] The Complainant alleged a series of matters which he classified as contraventions by the Board of the Radio Station. It was also brought to the attention of the CCC that the radio station has been taken off-air about a month

---

<sup>1</sup> 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 referred to Council for noting and are, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the Compliance and Consumer Affairs Division 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 an order 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.

ago by an official of ICASA: the grounds being that it had not, as from 2016, been in possession of a valid licence, which had originally been issued to it in March 2011 and lasted for five years – thus up to 2016.

[2] It is common cause that the Radio Station had applied for a renewal and that it was informed at a meeting with officials from ICASA in 2016 that they had omitted to comply with the prerequisite process of renewing their licence i.e. payment of the renewal fee and submission of five copies (5). The Station then filled in the form and sent it to ICASA. It did not hear from ICASA again – in any case, not before a month ago (in 2019), when they were taken off air, without notice.

[3] There are three reasons why the CCC is of the unanimous view that the official from ICASA had acted in conflict with the law by switching the Station off:

(a) Firstly, although there are certain acts which an official may take which she or he has by virtue of the very nature of her or his functions or the seriousness of the crime – e.g. a policeman may arrest a person if it is believed that that person has committed or is committing a crime in his presence, there are certain actions which may only be taken after a Court order (preferably a High Court) or an order as advised by the Complaints and Compliance Committee and accepted by Council of ICASA. However, the switching off of a radio station serving the public (in this case with about 120 000 listeners) – even if it is not licensed – is so serious that it may only be done after a Court (preferably a High Court) order or an order advised to the Council of ICASA after a hearing by the Complaints and Compliance Committee and which order is accepted by Council. Of course, there are circumstances where this will be permitted: for example, when during the Soccer World Cup a foreign broadcaster's signal would have disturbed an aeroplane from using its radio for contacting Oliver Tambo Airport.

(b) Secondly, section 19 of the Electronic Communications Act provides as follows:

**19. Renewal of class licence**

- (1) All class licenses must have a term of validity not exceeding 10 (ten) years, unless specified to the contrary by the Authority.
- (2) Class licensees seeking to renew their class licenses must, in writing and not less than six months prior to the expiration of their class licence, notify the Authority of their intention to continue to provide the services.
- (3) The renewal notice contemplated in subsection (2) must be submitted to the Authority in the manner prescribed as contemplated in section 5(7).

- (4) Within sixty (60) days of the receipt of the written notice submitted in accordance with subsection (2), the Authority must update the register of class licences referred to in section 16(3) to reflect the renewed licences.
- (5) Where the Authority fails to update the register referred to in section 16(3) the class licence is considered to have been renewed on the 61<sup>st</sup> day following receipt by the Authority of the class licensee's written notice.

Mr Ndhlovu, the Manager in the Licensing Division of ICASA, conceded during the hearing of this matter that he acknowledged receipt of the application and advised the licensee that they must comply with the prerequisite renewal process.

On closer inspection it was, however, decided not to renew the licence since it had already expired. The Broadcaster, however, was not notified and it accepted that all was in order and kept on broadcasting as in the past. The ECA requires that an application for renewal must be filed at the latest six months before its expiry.

The licensee was, however, not informed of this at the meeting. Mr Ndlovu, who was a reliable witness, conceded that an error had been made – possibly as a result of a fire which broke out in their Division and could have destroyed the basic paper work. Although it is true that Rock FM had not filed its application as required at the latest six months before its expiry, section 19 of the ECA makes it obligatory for ICASA to update the Register and where it fails to do so, section 19(5) provides that the class licence is considered to have been renewed.

(c) Thirdly, the *Turquand* Rule protects Rock FM. Thus CJ Claassen J stated as follows in *Land & Agricultural Dev Bank of SA v Panamo Properties 103 (Pty) Ltd 2014 (2) SA 545 (GJ)*

[28] The *Turquand* rule has been applied in South African law. In law a contract is therefore enforceable and valid if it is a contract of the type which the particular entity 'could' enter into, provided certain internal authorisation had been complied with. In contrast to this proposition, it is also trite that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. Estoppel cannot therefore be used to make legal what otherwise would be illegal. Thus it was held in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* as follows:

'It is important at the outset to distinguish between two separate, often interwoven, yet distinctly different categories of cases. The distinction ought to be clear enough conceptually. And yet, as the present matter amply demonstrates, it is not always truly discerned. I am referring to the distinction between an act beyond or in excess of the legal powers of a public authority (the first category), on the one hand, and the irregular or informal exercise of power

granted (the second category), on the other. That broad distinction lies at the heart of the present appeal, for the successful invocation of the doctrine of estoppel may depend upon it. *In the second category, persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, but are entitled to assume that all the necessary arrangements or formalities have indeed been complied with . . . . Such persons may then rely on estoppel if the defence raised is that the relevant arrangements or formalities were not complied with. (Emphasis added)*

As to the first category: failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because it would give validity to a transaction which is unlawful and therefore ultra vires.<sup>1</sup>

[29] It therefore requires a decision in this matter whether the facts fall within the first or second category of cases. I have come to the conclusion that the facts of the present matter cause it to fall within the ambit of the first category. I give my reasons for this conclusion.

That a State authority, such as ICASA, can also be bound by the Turquand rule, is supported by judgments of the High Court. For example in *Engineering Solutions (Pty) Ltd & Others* [2004] ALL SA 204(T) the following is stated by the Judge:

[37]As is well known, the *Turquand Rule* protects bona fide third parties against the defence by a corporate body that it had not complied with the internal requisites for a valid contract and was, accordingly, not liable. I do not believe that the *Rule* would protect a bona fide third party against an omission to obtain the Minister's approval. The *Rule* applies to cases where there was an omission in complying with a requirement of *interna* management. The Minister's approval is not an internal matter, but a matter external to the running of the Technikon. That some balancing must, in any case, take place when even internal matters are evaluated for their importance against the application of the *Rule*, emerges from the recent instructive judgment of Cleaver J in *Farren v Sun Service SA Photo Trip Management (Pty) Ltd*, where the learned Judge held that since a company cannot be held liable for a sale of its sole asset by a director, unless the approval of its shareholders is given in terms of section 228 of the Companies Act, the *Turquand Rule* could not save the transaction. This was so since the approval by shareholders was, in the Court's opinion, regarded as of particular importance by the Legislature. I agree with the balancing approach applied in the said judgment and, with respect, with the result thereof. In the light of my approach to the Minister's approval it is, however, not necessary to delve deeper into the application of the *Rule* in this respect.

[38] I might add that if I am wrong in my conclusion as to the ambit of the *Council's* approval as to detail, such as the mode of payment by way of promissory notes, the *Turquand Rule* would protect FPW. Engelbrecht was authorized to sign contracts and, accordingly, the *Rule* could be operative. The *Rule* is also applicable in regard to corporate entities such as Technikons. An omission in the approval of Council as to the mode of payment amounts to an omission in internal management, which would not have the weight of the absence of the shareholders' resolution in *Farren's* case or the absence of the

Minister's approval in terms of section 40(3)(b) of the Act. In any case, I am satisfied that the Technikon Council validly resolved, in terms of section 40(3)(a) of the Act, that there could be "embarked" upon this kind of project. The *Turquand Rule*, accordingly, does not need to be resorted to, except possibly in the alternative. [Footnotes to supporting judgments are omitted]

## CONCLUSION

[4] The conclusion reached by the CCC is, accordingly, as follows:

(a) That although the licence was, objectively, not renewed, the Authority had not informed the Respondent Radio Station that the license was not renewed. The Radio Station thus accepted that a renewal had taken place. Its view, as set out above, is supported by legal principle.

(b) The "switching off" by an employee of the Authority about a month ago was contrary to legal principles.

## ADVICE TO COUNCIL OF ICASA

[5] That it orders that :

**(a) The Radio Station be re-connected as soon as possible and, in any case, at least within seven calendar days.**

**(b) Notice be given to the Radio Station that this re-connection will take place and from when it will be effective. The last notice is important, since the radio station will have to prepare for such re-connection.**

**(c) Judgment on matters raised by the Complainant, will be prepared in due course and be placed before Council as soon as possible.**



JCW VAN ROOYEN SC

14 November 08:40

The Members of the CCC, who sat in this matter on 13 November, agreed with the order.