



Complaints and Compliance Committee¹

Date heard: 9 November 2020

CASE: 359 /2019

In the matter between:

SMIT

COMPLAINANT

RADIO ROSESTAD

RESPONDENT

Prof JCW van Rooyen SC (Chairperson)

Ms Dimakatso Qocha

Mr Peter Hlapolosa

Mr Mzimkulu Malunga

Dr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

Complainant: Reverend Johan Smit (Previously Manager of Radio Rosestad)

For the Respondent: Adv Sunette Lötter instructed by Jan Maree from Maree & Associates, Bloemfontein.

Coordinator: Ms Lindisa Mabulu and with her Attorney Meera Lalla

JUDGMENT

JCW VAN ROOYEN SC

[1] The complainant, who had been the station manager of *Radio Rosestad* (Bloemfontein) for about 8 months from 2018-2019, filed a wide-ranging complaint with the Complaints and Compliance Committee at ICASA. He had left

¹ The Complaints and Compliance Committee ("CCC") is an Independent Administrative Tribunal in terms of section 33 of the Constitution of the RSA 1976. It was set up in 2007 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 e.g. the Compliance and Consumer Affairs Division at ICASA) which it receives against licensees in terms of the ICASA Act 2000, the Broadcast Act 1999, 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 and confirmed by Council 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. The nature of the sanctions are limited by the ICASA Act. If no fine is *prescribed* no fine may be imposed: e.g. see the Postal Services Act section 80(4)(b) where no fine has yet been prescribed. A desist order may only be imposed where a finding has been made against a licensee. Once Council has decided, the final judgment is issued.

the services of the Respondent by agreement shortly before he lodged this complaint in August 2019. The agreement included that a disciplinary inquiry against him, initiated by the Board, would be withdrawn.

As a result of the COVID restrictions, this matter could only be heard on 9 November 2020 and be decided upon by the CCC on 18 December, as a result of a full schedule and the large amount of material filed in this matter – which had to be studied again in the light of what emerged at the hearing. The Complainant also, after the hearing, filed an additional document which undersigned had to permit the Respondent to reply to for reasons that will be explained later in this judgment.

[2] Although a large number of alleged contraventions are listed (to which we will return) an important part of the Complaint is whether the Board interfered with the daily operations of the Station in contravention of the Community Broadcasting Regulations 2019. There is, of course, no doubt that the Board must take responsibility for proper governance. And, furthermore, it is the *Board*, which holds the license in terms of a Trust and is the licensee. Thus, the Board is the Respondent when the Code for Broadcasters or the ICASA Regulations have, according to a complaint, been contravened. Most importantly the complaint is that the Chair of the Board interfered with the daily operations of the radio station by allegedly regularly contacting the Complainant as to what he should do to, inter alia, further the aims of the radio station as set out in the founding document. The 1995 founding document creates a Trust and does not include broadcasting as one of the aims of the Trust. However, the Trust's aims are wide enough to also accommodate broadcasting. No doubt, the trust is aimed to further what is, from an enlightened perspective, conservative values. However freedom of speech and freedom of religion are guaranteed in the Constitution of the Republic of South Africa, subject to the limitation of hate speech, as defined in section 16 of the Constitution and also included in the ICASA and BCCSA Codes of Conduct for Broadcasting.²

[3] Reference was also made in the complaint to a host of other omissions, consistently without laying a proper factual basis for such alleged contraventions. This amounts to a *plus petitio*³ which does not, according to our Courts, invalidate the one, more detailed, complaint (interference) referred to

² See the significant judgment of NAVSA JA in *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA).

³ "Over-loaded, vague application."

above – compare, *inter alia*, *Pogrund v Yutar*.⁴ However, to be fair, we will also list all the complaints and, where necessary, show that they do not amount to valid (*bona fide*) complaints, since a factual basis is not, or not sufficiently, set out in the documentation. The Respondent has, in fact, argued that the complaints are not *bona fide* complaints, but are motivated by the Complainant’s discontent with the Respondent, his previous employer, who had ended his services by way of an agreement that disciplinary charges against him would be withdrawn. However, it is not the CCC’s task to go into the reasons for the complaints but to weigh the complaints against the response of the Radio Station. And thus, ultimately, to decide whether there was a contravention of the Regulations. We will, accordingly, as an independent administrative tribunal, which is part of the judicial system of the RSA, approach the complaints objectively and accept that the Complainant has a right to complain – but, of course, who must also accept that justice must prevail – a principle which is deeply imbedded in our Constitution.⁵

[4] The view of the Complainant was and still is (as appears from his complaint and his address before the CCC), that *he* was the CEO of the radio station and that the Chair was interfering with his powers as CEO. The Complainant had, according to his application for the post, wide experience in managing community broadcasters. The Board, ultimately, differed from this view.

[5] It is disputed by the Radio Station that the Board had interfered in the daily operations of the station. It also disputes the other complaints – which are formulated, consistently, without laying a sufficient factual basis.

[6]The Complainant and the Chair of the Trust differed on several matters of principle, *inter alia*, relating to freedom of religion and freedom of speech. The Complainant also, amongst many other complaints, blamed the Chair of the

⁴ 1968 (1) SA 395 (A).

⁵ Lauded, justifiably, by United States Supreme Court Justice Ginsburg (Senior Court female Member who passed away recently in 2020 at 87 – famous and respected widely for her stand for the equality of female rights) on Egyptian Television as an “excellent piece of work” which should guide Egypt in the writing of a Constitution -See *Mail & Guardian* 24 February 2012.

Trust for interfering with the daily operation of the station. It should, however, immediately be pointed out that the Regulations prohibit the *Board* from interfering in the daily operations. In any case, a manager cannot and should not assume that she or he may act in isolation of the Board. There are matters of principle and policy which a manager simply may not amend on her or his own. It is, accordingly, a misconception under which the Complainant would seem to have acted, to believe that since he was the CEO he may simply manage a radio station without intervention by the Board, or the Chairman or Chair of the Finance Committee on behalf of the Board, which is the *licensee*. “Daily operations” however means, within context, nothing more than *administration directed at broadcasting*.⁶

COMPLAINTS

[7] So as not to burden this judgment with repetition, it should be mentioned that all the alleged contraventions mentioned were denied by the radio station in its Response. Sufficient details were also provided to substantiate the defence. For the sake of the Record, the full Response will be set out in this judgment, so that the allegations sketched broadly and without sufficient supporting material by the Complainant may be replied to fully by the Respondent.

[8] As will appear from what is stated hereunder, one cannot simply, in Law, lay a Charge without factual substantiation of the Charge in the written complaint itself, or simply broadly refer to such omission. This principle is, once again, well-stated by Constitutional Court Justice Leona Theron (and supported by six other Constitutional Justices) in *Gavric v Refugee Status Determination Officer and Others*:⁷

[151] The first judgment does not conclude that the procedural unfairness it identifies constitutes an exceptional case envisaged in s 8(1) (c). Nor could it properly so conclude on the facts on record. In support of the request for substitution, the applicant's affidavit filed in this court lists a number of factors, some of which are mentioned without any substantiation. *Without any supporting facts, the applicant accused the RSDO of incompetence and bias. In the absence of a factual foundation, this accusation cannot be sustained. Moreover, the High Court had rejected it.*”(accent added)

⁶ See the argument of King's Counsel in *Ko-operatiewe Wynbouwers Vereniging van ZA Bpk v Industrial Council for the Building Industry* 1949 (2) SA 600 (A) as to the term “farming operations” and accepted by the Court.

⁷ 2019(1) SA 21 (CC).

The Respondent must, indeed, be placed in a position where the complaint is set out with sufficient detail so that it knows what to respond to. A Complainant is not permitted in law to simply state a contravention without providing sufficient supporting facts in the *written* complaint. A complainant may not add to a complaint when she or he argues the case before the CCC. The written Complaint sets the bounds within which the *argument* must be based at the hearing. Thus: it is simply not permitted in law to widen a complaint in argument; explain – yes; expand – no.

The Respondent, nevertheless, in its answering statement, has denied all these charges and has provided the CCC with satisfactory answers – as convincingly argued by Ms Lötter from the Pretoria Bar, appearing for the Respondent. Nevertheless, in the interests of justice, we decided to set out all the complaints. They are, however, all justifiably denied by the Respondent as not true or stated out of context and, ultimately, rejected, justifiably, as not amounting to *bona fide* complaints – the term having been explained above by Justice Theron.

COMPLAINT ON INTERFERENCE BY THE BOARD

[9] We first deal with two instances which were set out in more detail in the complaint. The licence provides, inter alia, that “the licensee shall broadcast Christian religious programmes.” The Complainant attached the views which were expressed by members of a Committee of Council (Religion Committee) on the subject of the approach to religion broadcasts. The Committee consisted of the Chair of the Board and a number of Ministers of Religion from Afrikaans speaking denominations – the vast majority of whom differed substantially from the approach of the Chair. The Complainant’s view is also included amongst that of the majority. We need not dwell on the reasons for the difference: what is important is that whatever the Chair’s view was, the said majority of the Board Committee did not support it. And, for purposes of this judgment, we will - it is believed justifiably - accept that the view expressed by the majority of the Committee amounts to the policy of the licensee.

The Complainant alleged that the Chair of the Board exercised pressure on him to espouse his view insofar as broadcasts were concerned. The above mentioned committee of the Radio Station, however, rejected this approach for purposes of broadcasting Christian services. Thus, even if the Chair did attempt to influence the Complainant, it was not the *Board*. And the Regulations provide

that the *Board* must not interfere with the daily operation of the radio station. In any case, it is a matter of principle for the Board or Board Committee to decide on and not the station manager. The latter is bound by the opinion expressed by the majority – a view with which he, in any case, agreed.

Of course, freedom of religion is guaranteed by section 15 of the Constitution of the Republic of South Africa 1996. However, also this freedom is limited. The Constitutional Court has, for example, held that (a) adult persons may use or be in possession of cannabis for their personal consumption in private; (b) the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons would not be permitted; (c) the use or possession of cannabis in private other than by adults for their personal consumption would not be permitted; (d) the cultivation of cannabis by adults in a private place for their personal consumption in private would no longer be a criminal offence. This opened the possibility to use dagga for religious purposes, but as defined by the Constitutional Court.⁸ Freedom of speech is, in any case, excluded in the following circumstances, according to section 16(2) of the Constitution:

The right in subsection (1) does not extend to:-

(a) propaganda for war ;(b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Broadcasting Code of ICASA, as well as the similarly worded Broadcasting Code of the Broadcasting Complaints Commission of South Africa, as approved by ICASA in 2010, also prohibits broadcasts of this nature. Of course, this limitation would also apply to broadcasts of religious services.

The matter of religion is, in any case, a matter for the Board and not the Chair. No finding can, accordingly, be made against the licensee: the Board. The Board is entitled to lay down policies - and that would include the approach to religious broadcasts. This complaint is, accordingly, dismissed. The Complainant was,

⁸ *Minister of Justice & Constitutional Development & Others v Prince & Others* 2018(6) SA 393(CC).

accordingly, entitled to ignore the view of the Chair in the light of the Board Committee's approach.

[10] As to freedom of expression and choice of guests on the radio station, the Chair conveyed to the Complainant in a note that he had received complaints from listeners that interviews had been broadcast with well-known personalities who had taken part in a local (Bloemfontein) festival. These (Afrikaans speaking) personalities are well known to publicly support the freedoms guaranteed by the 1996 Constitution. On the facts before the CCC this was, once again, not a case of interference by the *Board*. In any case, the Chair of a Licensee would have a duty to inform the Station Manager of complaints received. To have quoted this incident as *interference* is not justified. In any case, it is not the *Board* which was interfering.

[11] As background to his complaint the Complainant defines the relationship between the Board and Management as dysfunctional. He blames the Board and the Chair for this. However, the two detailed examples which he provides as interference by the Board with the daily operation have already been dealt with in paragraphs 9 and 10 and held to not support his complaint. At least the subcommittee clearly rejected the view of the Chair. If the *Chair* ignores the approach of the subcommittee, it is for the Board to intervene, not ICASA. That is an internal matter.

[12]The Complainant alleges further that the relationship of the Board with Management is dysfunctional and places the blame on the Chair of the Board. He refers to Regulation 5, but does not supply sufficient information to support his complaint. It is also alleged that the Broadcasting Code, which lays down rules as to what may not be broadcast, is being contravened.

It is impossible for the CCC to come to a decision on this allegation. Firstly the Complainant was only in the service of the radio station for eight months and, further, his eight months with the Station were interrupted by three disciplinary complaints- two of which were heard; the third having led to his resignation by agreement – with the result that charges were, in effect, withdrawn. Further, sufficient detail is not provided. However it is clear that the relationship with the Chair of the Board was not a good one, from the perspective of the Complainant. No detail is given about alleged contraventions of the Code of Conduct of the

BCCSA.⁹ In fact, members of the listening public have a right to complain to the BCCSA or, in instances where ICASA has jurisdiction (e.g. during Elections in regard to election complaints) to this Tribunal. There is no record of election matters having been brought before this Tribunal and there is one reported instance where a complaint was dealt with by the BCCSA in 2014.¹⁰

[13] Having dealt with the above matters which were central to the Complaint and having dismissed the complaints, it would be fair to also provide an overview of the other complaints. As will appear, the complaints hereunder are ultimately dismissed on grounds that they do not amount to *bona fide* complaints as defined by Justice Theron in the Constitutional Court matter quoted earlier.¹¹ In any case, as will appear from the Response from the Respondent Radio Station to the allegations, the complaints are shown to be unfounded.¹²

BALANCE OF THE COMPLAINTS

[14] The Complainant set out his further complaints as hereunder:

(a) Founding document

Governance and Management

The founding documents of an applicant must reflect defined roles of management and board members.

(b) The role of the Board includes, but is not limited to:

(a) Ensuring compliance with all relevant laws, regulations and codes of good practice;

The Trust is derelict in its duty especially with regard to regulations and codes of good practice. See the introduction above and what follows after this.

(c) Except for a policy on religious programs there are no policies giving strategic direction to the licensee. The only strategic direction that has been given is that of far right fundamentalist ideology which will guarantee the demise of the station.

⁹ The radio station falls under the jurisdiction of the BCCSA (except insofar as e.g. elections are concerned).

¹⁰ *Van der Merwe v Radio Rosestad* [2014] JOL 31578 (BCCSA).

¹¹ See footnote 7 above.

¹² See footnote 7 above.

(d) Development of a corporate code of conduct;

No code of conduct exists and none is being developed. On the contrary, even the most basic rules of sound management is being disregarded.

(e) Identification of risk areas and performance indicators;

Nothing has ever been done and none exists.

(f) Monitor implementation of the Board's plans;

Non-existent with regard to both planning and monitoring.

(g) The role of the Station Manager includes, but not limited to: (b) recruiting staff and volunteers etc.

(h) Managing daily operations and delegating control of other departments etc.

(i) Instilling discipline through written and approved policies that detail corrective actions and procedures; this being one of the basics of sound management, it was in the process of implementation at the time of my suspension. However, instilling discipline was materially hampered by staff interacting with, and being allowed to interact with trustees (and *vice versa*), without my knowledge -thereby undermining my authority.

(j) The Station Manager must serve as *ex officio* member of the Board and report to the Board. I was excluded from the majority of Trust meetings held during the first six months of 2019 (not sure how many because I was not notified and I have been refused minutes of such meetings).

(k) Charges were laid against me. The *audi alteram partem*¹³ rule was never applied and the issue of the ideological agenda of the chair, dr. Schlebusch, was discussed. He regarded me as an enemy of the people (*vyand van die volk*) who could make things difficult for him in meetings.

(l) Management is responsible for the daily administration duties of a licensee.

This principle was not adhered to at all. Constant meddling in even the most trivial of administrative matters was the rule.

¹³ "Hearing the other side"

(m) The Board must not interfere in the daily operations of a licensee.

Again, this principle was not adhered to at all with micro management and second guessing the order of the day to the point where I, on more than one occasion, asked the ExCo why they had appointed me, a seasoned broadcasting professional, if they did not listen to my advice and respect my management decisions.

(n) Prohibited Office Bearers

Directors may not be in alliance with any organization that is in an alliance with a political party;

The members of the Trust have not, to the best of my knowledge, declared any personal interest whatsoever. I am quite sure that some of them, especially the chair, Dr. Schlebusch, are affiliated with political parties, or at the least, with organisations in alliance with political parties.

(o) Surplus Funds

A community broadcasting service licensee must, in the event of a surplus, utilise and/or invest the funds in the community served for the purposes of community development. The station and therefore the Trust has built up sizeable cash reserves from surpluses generated over the years and this has not been utilised in spite of the fact that the founding document of the Trust also stipulates that profit/gain should in no way be the purpose of the Trust.

(p) Management Contract

(1) Management contracts must be lodged with the Authority for approval. This has not been done and the contract that I had to sign would not pass scrutiny.

(2) Ownership of the community broadcasting licensee remains with the community being served;

This is highly debatable in view of the total control being exerted by the Trust and more specifically, its chair.

(q) Editorial Control

“a licensee retains editorial and programming control and independence;

The chair, Dr. Schlebusch, intervened with regard to content

being broadcast in programs on different occasions in spite of being advised against it. The last time was when I raised my objections to the Trust in writing and was suspended for it.

(r) Fiduciary duties remain the responsibility of the Board;

To the best of my knowledge no financial records exist prior to May 2018 and if they do, I was denied access to them. The audit report for the 2017/2018 and the 2018/2019 financial year had not been finalised at date of writing and not been presented at either the AGM or to the Authority.

RESPONSE BY RADIO STATION

[15] Radio Rosestad responded as follows

MEMORANDUM IN RESPONSE TO A COMPLAINT LODGED BY JOHAN SMIT REFERRED TO RADIO ROSESTAD BY THE COMPLAINTS AND COMPLIANCE COMMITTEE

1. INTRODUCTION

No charge sheet was submitted to Radio Rosestad by the Complaints and Compliance Committee (hereinafter referred to as "The CCC"). The response will therefore follow its own sequence.

2. THE ENTITY AGAINST WHOM THE COMPLAINT WAS LODGED

2.1 For purposes of establishing a radio station and the obtaining of a licence a trust was established being the OVSUK Trust with registration number TMP4156. The trust trade as Radio Rosestad and is the holder of the broadcasting licence.

2.2 The current trustees of the trust with their positions held are as follows:

2.2.1 Jan Schlebusch

Chairperson of the Board of Trustees

Chairperson of the Executive Committee (Dagbestuur)

Chairperson of the "Grondslag Komitee"

2.2.2 Jan Jacobus Maree

Vice Chairperson of the Board of Trustees

Member of the Executive Committee (Dagbestuur)\

Chairperson of the Finance Committee (Finansiële Komitee)

2.2.3 Prof Matie Hoffman

Former Chairperson of the Board of Trustees and currently a acting us trustee

- Member of “Grondslag Komitee”
- 2.2.4 Roy Els
Trustee member
- 2.2.5 Theo Theron
Trustee member
Member of the Finance Committee
- 2.2.6 Daan van Tonder
Trustee member
Member of the “Grondslag Komitee”
- 2.2.7 Johan Fourie
Trustee member
- 2.2.8 Rinus van Huyssteen
Member of the Finance Committee
Member of the “Grondslag Komitee”

3. ELECTION OF TRUSTEES

Trustees are nominated at an annual general meeting of members of the community served by the broadcasting entity.

4. COMPETENCE OF TRUSTEES

The trustees from time to time do assess the competency and performance of trustees in terms of corporate governance principles. This process has confirmed that the trustees do have the following competencies:

4.1 has undergone training in corporate governance principles to fulfil the roll as trustee (similar to the directors of companies). Collectively the status is as follows:

4.1.1 training was received from the Institute of Directors in respect of “fulfilling the role of a director”

4.1.2 has attended various training sessions to fulfil this roll

4.1.3 has served as members of Audit Committee, internal Audit Committee, Finance Committee, Human Resources Committee, etc. The collective experience of trustee members are in excess of fifty years.

This aspect is of importance since this response will indicate that the complainant does not have any understanding of governance principles and the oversight role that any Board of Directors, Governing body or in this particular instance the trustees need to fulfil.

5. GOVERNANCE PRINCIPLES APPLIED BY THE BOARD OF TRUSTEES

5.1 The board of trustees fulfil the overriding governance functions of a governing body and meets at least once per quarter.

- 5.2 The board of trustees consult on a regular basis with members of their community which it serves and does have at least one annual general meeting and a further general meeting of members of the community annually.
- 5.3 The board of trustees does have the following sub-committees that report to the trustees:
 - 5.3.1 Executive Committee; (responsible for the day to day business of trustees as and when necessary)
 - 5.3.2 Financial Committee; (to oversee the financial status of the institution)
 - 5.3.3 “Founding Committee”¹⁴ (advise the trustees on inter alia vision and mission of the institution and fulfil an oversight function over broadcasters to ensure compliance with the vision and mission as well as licence requirement)
 - 5.3.4 “Religion Committee”;(the board of trustees does have Christian faith approach and Radio Rosestad is one of the few if not the only broadcasting entity where qualified ministers of religion of all Christian denominations serve and take part in Christian activities)
- 5.4 The Board of trustees is responsible to approve the organogram of management of the entity. The following is the organogram of management:
 - 5.4.1 a general manager
 - 5.4.2 a program manager
 - 5.4.3 a chief financial officer
 - 5.4.4 a marketing/advertising manager managing the marketing section in selling advertisements to members of the public.

6. RESPONSE TO THE COMPLAINT

The first and foremost aspect to be dealt with in the response to the complaint is to record that the complaint is not a *bona fide* complaint.

The complainant was appointed by the OVSUK Trust in terms of a fixed term contract for one year as Executive Manager as from the 14th of November 2018.

The relationship with the newly appointed Executive Manager had a disastrous turnout in that it was necessary to institute disciplinary proceedings of sexual harassment following a complaint by one of the employees. The disciplinary hearing was on 7 January 2019, within two months of the appointment. The labour consultant (the trustees resolved to appoint an external consultant to ensure independence and objectivity), with the approval of the trustees, withdrew the main charge of sexual harassment following a plea of guilty (on an alternative) by Mr Smit that his conduct was contrary to the interest and reputation of the employer. The sanction imposed was a final warning.

Following the above disciplinary procedure it was again necessary to institute a disciplinary enquiry and the trial took place on the 9th of April 2019. Once again the complaint was sexual harassment.

The Chairperson of the disciplinary enquiry made a recommendation of discharge with immediate effect. A copy of the finding is attached as **Annexure “1”**. The employee

¹⁴ Grondslag Komitee (translated in text by Chair:CCC)

(Mr Smit) appealed against the finding and made certain representations to the employer.¹⁵

The above was unfortunately not the end of disciplinary proceedings against Mr Smit and we attach hereto a copy of a charge sheet regarding dishonesty, conduct in conflict with the interest of the employer, the neglect to execute instructions.¹⁶

It should be emphasised:

- That charge one is in respect of dishonesty by using the business credit card for personal gain;
- Charge two relates to a lack to effectively taking control over the finances causing serious financial losses. At Financial Committee meetings it was ascertained that Mr Smit did not even realize or note the relevant facts influencing financial results.

It was ascertained by the Financial Committee that invoices in respect of airtime sales ...in excess of R200 000.00 were written back in January and February 2019. The Financial Committee had a meeting on 28 March 2019 to specifically look at the control environment. A copy of the minute is attached hereto¹⁷ as Annexure "3". The following need to be noted:

- i) The oversight role of the Financial Committee is highlighted in paragraph 4.
- ii) Paragraphs 5.3 and 5.3.1 deal specifically with controlling measures instituted in respect of the writing back of invoices and the controlling measures that need to be executed. Notwithstanding this resolution invoices were written back as follows:

April 2019	R 57 108.00
May 2019	R 89 818.00
June 2019	R 33 659.00
July 2019	R101 648.00

Once again it became clear during meetings of the Financial Committee that no control was effected and Mr Smit was unable to give reasons why income in excess of R300 000.00 was written back as from March 2019 to July 2019.

¹⁵ It is not necessary for purposes of this judgment to include it as an attachment. It forms part of the Documentation, which is kept on Record by ICASA.

¹⁶ It is not necessary for purposes of this judgment to include it as an attachment. It forms part of the Documentation, which is kept on Record by ICASA.

¹⁷ It is not necessary for purposes of this judgment to include it as an attachment. It forms part of the Documentation, which is kept on Record by ICASA.

- iii) The necessity for the Financial Committee (duly authorised by the trustees) to take control of the finances followed from the fact that the monthly management accounts indicated that losses were sustained for May 2019 in the amount of R185 946.00, in June 2019 to the extent of R126 872.00 and for July 2019 in the amount of R210 536.00.

It has become eminent that Mr Smit was incurring expenses without understanding of the financial consequences. In particular we attach hereto confirmation from the financial officer that Mr Smit did not meet with her once whilst serving in the most senior capacity as **Annexure "4"**.

- Charge three relates to expenses that were incurred that does not have any relation to the income;
- Charge four also entails dishonesty by claiming and was paid overtime in direct conflict with the contract of employment;
- Charge five also entails dishonesty.

The outcome of disciplinary proceedings was that Mr Smit did not stand his trial but agreed to enter into a separation agreement. A copy of the separation agreement was attached by the Respondent.¹⁸ To facilitate the disciplinary enquiry Mr Smit was again suspended with full pay as from the 11th of July 2019. In terms of the separation agreement his services terminated on 30 September 2019 but his last day of service was 29 August 2019.

It is noteworthy that shortly after the signature of the separation agreement on the 29th of August 2019, Mr Smit proceeded with this complaint to the CCC.

It is submitted that the complaint is not *bona fide* and was made with the intention to prejudice and harm his former employer as was indicated above.

As indicated:

6.1 That almost from day one it was necessary to take disciplinary action against Mr Smit.

Within the ambit of six months three disciplinary procedures had to be instituted; and

6.2 That almost from day one it was necessary to take control of the finances since it has become clear that Mr Smit did not have any understanding of finances and the control environment within an institution.

The above indicates the breakdown in relationships.

In particular Mr Smit is on record in respect of the charge of dishonesty that he "took money to compensate him for the loss of salary" whilst being suspended with no payment. This is indicative of his attitude towards the employer.

¹⁸ It is not necessary for purposes of this judgment to include it as an attachment. It forms part of the Documentation, which is kept on Record by ICASA.

7. REGULATION 5(1) THE COMPLAINT ITSELF

7.1 All of the aspects are dealt with simultaneously. As indicated above the board is collectively well experienced to apply governance principles and understands the oversight role. An example of the understanding of risk principles and the oversight function can be found in a copy of the minute of the Financial Committee of 28 March 2019, indicating steps that were taken from an oversight perspective and to institute control mechanisms.¹⁹ Regular liaison, over and above formal meetings, are taking place between the Executive Committee, the Financial Committee with the General Manager.

7.2 The following further aspects are dealt with under Regulation 5.1:

- The allegation that a new station manager, Mr Anton Cloete, was appointed is once again unfounded and incorrect. Firstly Mr Cloete was never found guilty of serious financial misconduct. Secondly he was only appointed in an acting capacity whilst Mr Smit was suspended. The allegations are reckless to the extreme and defamatory.
- The appointment of a new program manager: Mr John Gunter. Once again the statement is incorrect and unfounded. He was appointed in an acting capacity.
- The appointment of a new news editor: Mr Gerdie Karstens. Once again the allegation is untrue and unfounded since no such appointment did take place.
- The statement that it was publicly declared that Mr Smit will be found guilty is without substance and untrue. The Labour Law required that a formal charge sheet must be handed in at a disciplinary enquiry which was done. It is not in accordance with legal principles that the charge sheet should be dealt with outside the disciplinary enquiry.
- It is correct that Mr Smit did write letters to the trustees in an attempt to convince the trustees not to proceed with the disciplinary enquiry. The evidence was of such a nature that the trustees resolved to proceed with the disciplinary enquiry.

The statement that the trust is dysfunctional : once again is not *bona fide* and without any substance. The trust is not going to further deal with this unwarranted statement.

8. REGULATION 5(4)

8.1 THE SEPARATION OF POWER IN THE OPERATIONAL MANAGEMENT AND THE TRUSTEES

¹⁹ It is not necessary for purposes of this judgment to include it as an attachment. It forms part of the Documentation, which is kept on Record by ICASA.

Once again this is without substance. With due respect to Mr Smit he does not have any understanding of corporate governance principles and the roll of a governing body that must execute oversight. One typical example is that Mr Smit prepared a budget for the 2019/2020 financial year which was submitted to the board of trustees. From what follows hereunder this budget was “farfetched” and figures were used that have no comparison to the actual financial status of the institution. When the budget was not approved Mr Smit took the stance that it is “his budget” indicating that he was appointed in an executive position and the trustees could not approve or reject the budget.

8.2 OVERSIGHT BY FINANCIAL COMMITTEE

What is correct is that it was necessary for the finance committee to take control of the expenses that Mr Smit was incurring. He did appoint personnel and was incurring expenses with the result that the financial results were as stated in paragraph 6(ii) and 6(iii) above.

It is furthermore correct that the previous Chairperson of the Financial Committee indicated that he is not prepared to grant Mr Smit full powers to run the finances of the institution, due to the fact that Mr Smit had no understanding of the financial consequences of what he was doing. The trustees intervened to the extent that the Chairperson of the Finance Committee resigned as Chairperson of the Finance Committee and as trustee. As Chair of the Finance Committee the Chair had insight in the running of the financial affairs by Mr Smit. The former Chair was proven correct taking into account the financial results as indicated above in paragraph 6(ii) and 6(iii).

8.3 THE ROLE OF THE STATION MANAGER

8.3.1 Recruiting staff and volunteers. It is simply incorrect that the Station Manager was not able to recruit staff. What is correct is that the Station Manager received instructions to start a restructuring process to reduce staff costs. To the contrary staff costs were R481 468.00 on average per month when Mr Smit was appointed. He appointed staff to the extent that staff costs escalated to the amount of R597 126.00 on average per month by June/July 2019 - an escalation of 24.02%. With an enterprise with a decreased turnover this aspect was the exclusive cause for the losses that were sustained as stated above.

8.3.2 Managing daily operations and delegating control. The structuring of staff with specific reference to the organogram was discussed and was done in consultation with the Station Manager. Notwithstanding Mr Smit’s statement that managers were demoted, staff costs increased as stated above.

8.3.3 Instituting discipline. It is incorrect that Mr Smit was not allowed to institute disciplinary proceedings. He did institute one such proceeding but the employee was found not guilty – a futile attempt to get rid of employees that did not fully accept his authority.

8.3.4 The Station Manager to attend board meetings. The minutes of the board meetings once again indicate that his statement is untrue and incorrect. He did attend board meetings with the exception when his position and disciplinary actions were discussed and when he was excluded as mentioned in paragraph 7.2 above.

- 8.3.5 Interference in the daily operations. Two aspects are relevant:
 - 8.3.5.1 It was necessary to ask that Mr Smit recuse himself due to the disciplinary proceedings on a regular basis; and
 - 8.3.5.2 Mr Smit referred to himself as a “seasoned” broadcasting professional whose advice was not accepted. The response is that he simply does not have any financial understanding and the control environment causing a loss as indicated above.
 - 8.4 An aspect to be dealt with is the interacting between trustees and employees. Due to a number of reasons, *inter alia* the disciplinary action against Mr Smit, the relationship between himself and employees was at a low level. Two meetings were scheduled with personnel, with the knowledge of Mr Smit in an attempt to stabilize the relationship and to point out to the employees that they are obliged to accept Mr Smit’s authority. In particular it can be reported that when Mr Smit’s term of office was terminated in terms of the separation agreement, the other managers reported to the trustees that the personnel had expressed the dire need to meet with the trustees. There was a general view amongst personnel that the status at the station was deteriorating and that they did not have any access to the trustees whilst Mr Smit was employed.
 - 8.5 The result of the above meeting was that the trustees arranged a workshop to discuss with all personnel the strengths and weaknesses of Radio Rosestad to ensure that the trustees deals with issues that have developed.
- 9 **REGULATION 5.5**
Mr Smit attended all trustee meetings when operational issues were discussed. As indicated above, it was necessary to request that the Station Manager recuse himself from time to time.
10. **REGULATIONS 5.7 & 5.8**
The response above indicates why it was necessary to intervene with the managerial responsibilities of Mr Smit.
11. **REGULATION 9.1(a) - PROHIBITED OFFICE BEARERS**
The statement of possible alliance with political parties is unfounded and without substance. The Chair does not belong to any political party.
The “trust aim” is defined in paragraph 5 of the trust deed. The condition under which the licence was granted specifically also indicates that the radio station must serve the culture and language of the Afrikaner.²⁰
12. **REGULATION 11(1) - SURPLUS FUNDS**
12.1 The station was in consultation with SAMRO as to the financial obligations towards SAMRO for the financial years 2016 – 2017 and 2017 – 2018. For this reason, no allocations could be made to members of the community for the two financial years ending 28 February 2018 since the obligations towards SAMRO were substantial.

²⁰ This debate was already dealt with earlier and the Chair’s view was not accepted by the vast majority of the Committee.

A final agreement was reached with SAMRO with the result that in respect of the financial year ending 28 February 2019 allocations were indeed made with the full knowledge of Mr Smit. He was in fact instructed to make the necessary payments which he neglected to do. The awards amounted to R133 000.00 and was made available to seven institutions and two individuals with meritorious needs. The criteria applied for purposes of the awards were *inter alia* that all institutions should be involved in community development and are serving the poorer section of the community that the radio station serves.

13. REGULATION 12(1) & (2) - MANAGEMENT CONTRACT

13.1 Mr Smit alleges that he did have executive authority and the responsible person for operational issues. If he did not lodge his contract with the authority he has neglected also this responsibility.

13.2 The provision that ownership vests with the community:

As indicated above two meetings per year are held with the community where full disclosure of finances, broadcasting programs and policies are discussed. Comments from the community are invited at such meetings to ensure implementation of proposals received from the community.

14. REGULATION 13(1) – COMMUNITY PARTICIPATION

As indicated above regular meetings are held with the community. The allegation that there is no participation is unfounded and untrue. Mr Smit in person attended and made contributions to the annual general meeting with members of the community that was held in May 2019.

15. REGULATION 14 – CODE OF CONDUCT

The code of conduct as prescribed in the Regulations is observed by the trustees to ensure compliance.

16. REGULATION 16 – RECORD KEEPING

The statement that record keeping is virtually non-existent is denied. Thus:

16.1 Proper financial records are kept. To the contrary apart from annual financial statements, management statements are drafted by an auditor monthly.

An asset register exists and is audited annually.

16.2 Regular VAT returns are filed with SARS and are kept.

16.3 IRP5 certificates are issued and are kept in terms of SARS regulations.

Although there is no legal obligation the financial records of the institution are audited annually and audited financial statements are presented to the trustees and reported to the community....

Not once but on numerous occasions Mr Smit was reminded to ensure that proper systems and proper record keeping (“a paper trail”) is available. He did not comply with the result that he was formally charged.

The bold statement that record keeping is not in place is *mala fide* and with an adverse intent.

FINDING BY THE CCC

[16] The CCC has come to the following conclusions:

(a) The vagueness of the vast majority of complaints taints the complaint with not amounting to a *bona fide* complaint in terms defined by the Constitutional Court, quoted earlier in this judgment.

(b) In the few instances where more detail was supplied (religion and the complaint about a choice of guests) the CCC has already made a finding in favour of the Radio Station. This also applies to the allegation where surplus funds were said to exist - which was indeed, according to the Respondent, recently earmarked for certain institutions or persons in need of support.

(c) Although the founding Document of the Licensee does not set out positions and functionaries, ICASA has accepted the Trust as the licensee and has more than once renewed the license based on it. The Respondent, in as much detail as would be fitting for a matter such as the present, sets out different functionaries and committees. The functionaries and committees are clearly directed at the typical controls and committees of Council, which one would expect from a Licensee. The competence and training of trustees is also clearly on the Agenda and there is no evidence that this policy is not complied with from time to time. It is alleged that the appointment of the Complainant had a “disastrous” effect. Within the short time he was in the employ, disciplinary hearings as described in the full documentation, had to be held. Ultimately, pending the hearing of a charge concerning what one could call alleged mismanagement, the Complainant stepped down by agreement with the Board.

(d) The Complainant, in his address before the CCC, conveyed his numerous frustrations. It was clear that he saw his position as a CEO, whilst the Governing Body regarded him as nothing more than a manager, who should also comply with their style and ideals in broadcasting. In favour of the Complainant it may be accepted that he had some executive functions – but that could never have included running the station as a CEO. A licensee cannot simply sit back and permit a manager almost full executive authority. In fact, the Response demonstrates a substantially involved Board - which is indeed necessary when the importance of a licence to broadcast to the public is issued. It also makes sense that the Board must confirm appointments of permanent staff. Ultimately it is true that the Regulations prohibit interference by the Board in the daily operations. But that would not mean that it could not be expected from the Complainant to fit into the legitimate expectations of the Board. It is also clear that, although it is accepted that the Chair of the Board had his own

expectations, which could be regarded as conservative, the Religion Committee of the Board clearly rejected his approach to religion insofar as broadcasts are concerned. In any case, the final responsibility for a broadcaster lies with the Board (in this case a Trust and the Board). The Complainant was overly optimistic about his powers. “Daily operations” does not mean much more than administration with some executive functions. However, the administration of the Radio Station must remain within the aims of the Board, which must, of course, be legitimate aims. If a broadcast amounts to a contravention of the Broadcasting Code, the *Licensee*, the Board, is held responsible and a high frequency of contraventions may lead to a suspension of its licence for a month²¹ or a denial of a renewal of the license. There is, accordingly, much at stake for the Board and it would be surprising if the Board would simply sit back and not expect the station to be run successfully and financially productive, so that broadcasting quality would remain optimal. In fact, the response by the Board demonstrates an active Board run in accordance with business and community interests at heart. Our Courts,²² in any case, recognise substantial compliance as performance. There is no doubt that the Response by the Board through its attorneys who filed the documentation, demonstrates that the licensee is at least in substantial compliance.

[17] After the close of the proceedings the Complainant filed a supplementary statement. Unfortunately the secretary of the Coordinator’s Office, who had also taken care of the virtual hearing, received this additional statement and *bona fide* distributed it by email to the members. There is no doubt that the supplementary document was filed irregularly. The proceedings of the matter was closed and a judgment would be based on that. However, given the fact that the document was distributed, the undersigned granted the radio station an opportunity to respond.

At the end of the Response the additional document was justifiably opposed by the Respondent as having amounted to an irregularity which prejudiced it. It applied that the additional document be struck from the Papers. The additional document and the response on the merits by the Radio station are struck from the Papers, except insofar as the *application* to strike the additional material is concerned.

The Complaint is not upheld.

²¹ Section 17E(2)(d) of the ICASA Act, which provides that when a broadcasting licensee has been found guilty frequently, it may be closed down for a month. In one instance a radio station was closed down, but the circumstances had become intolerable as a result of what could be called “warring” factions within the community and the Board - see *In re Karabo* Case 308 /2018.

²² Compare *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).

J.C.W. van Rooyen

JCW van Rooyen SC

Chairperson

18 January 2021

The Members agreed