COMPLAINTS AND COMPLIANCE COMMITTEE[1]

16 October 2019 CASE NR: 356/2019

In a matter referred by the
COMPLAINTS AND COMPLIANCE AFFAIRS ICASA
RE
SABC (SAFM, RADIO 2000, LIGWALAGWALA FM AND TRU FM) **RESPONDENT**

COMMITTEE: Prof JCW van Rooyen SC (Chairperson)
Councillor Dimakatso Qocha
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Dr Jacob Medupe
Mr Jack Tlokana
For the CCA: Senior Manager Ms Fikile Hlongwane (Licensing) and Manager Ms Busisiwe Mashigo(CCA)
For the Respondent: Mr Nyiko Shibambo, Ms Refilwe Timana, Ms Juanita van Rensberg and Ms Judy Monyela
Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Meera Lalla

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JUDGMENT

JCW van Rooyen

[1]The Complaints and Compliance Affairs Division of ICASA, in the execution of their monitoring functions during the 2019 National Election referred six matters to the CCC. The SABC conceded that, in the radio stations mentioned above, contraventions had taken place. The particulars are as follows:

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[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 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.

The reference reads as follows:
It has come to the Authority's attention that the following Radio Stations, (under the control of the SABC) contravened the Regulations on Party Election Broadcasts and Political Advertisements Regulations - The Equitable Treatment of Political Parties 2014, as amended ("the Regulations"). The Authority's monitoring exercise detected the following:

(a) **In respect of SAFM:**

- On 15 April 2019 at 20:45 transmitted the Democratic Alliance PEB instead of Forum 4 Service Delivery and Vryheidsfront Plus PEB.

- On 16 April 2019 at 09:25 transmitted the African National Congress PED instead of the Economic Freedom Fighters and United Democratic Movement PEB.

(b) **In respect of Ligwalagwala FM**:

On 29 April 2019 transmitted the African National Congress twice, at 17:33 and 17:45.

(c) **In respect of Radio 2000**:
On 13 April 2019 at 18:12:32 transmitted the Vryheidsfront Plus PEB which was not scheduled for that time but rather scheduled for the period between 18:00 and 21:00. Further transmitted the AL Jama-Ah PEB outside of the scheduled time at 21:24, which was scheduled between 15:00 and 18:00.

2.4) **In respect of Tru FM:**
On 2 May 2019 at 17:47:07 transmitted the African National Congress PEB immediately after the Democratic Alliance PEB.

[3]The Regulations provide as follows: .
Regulations 4(17) states that "a broadcasting service licensee must not transmit a PEB immediately before or after another PEB or immediately before or after a PA."

Further, Regulation 4(20) states that in an event that a party elects to forfeit its allocated PEB air-time, then such air-time must not be allocated to another party, must be used by the broadcaster concerned for the

purposes of broadcasting its normal programming."

[2]The SABC was required to respond to the above and then the final charge sheet was sent to the SABC and the Coordinator of the CCC:

Contravention of Regulation 6(12) of the National and Provincial Party Elections Broadcasts and Political Advertisements Regulations, 2014, as amended ("the Regulations")
We acknowledge receipt of your response dated 26 July 2019.
We have reviewed the content thereof and have noted that the SABC concedes that it has contravened the Regulations as per our letter of 22 July 2019.As to the explanation provided in terms of AL Jamar PEB, we advise that we are not satisfied with the SABC's response that the contraventions in respect of SAFM occurred, because the SABC did not receive the PEB's from the political parties allocated as per the Authority's PEB Schedule.

We have also noted that in terms of Ligwalagwala, the SABC transmitted the ANC's PEB which was not scheduled by the Authority. Further, that in terms of Radio 2000, the SABC transmitted the VF+ PEB which was not scheduled by the Authority. Accordingly, please note as follows:

(1) The Regulation 20 of the Regulations provides that:

"In the event that a party elects to forfeit its allocated PEB air-time, then such airtime must not be allocated to another party but must be used by the broadcaster concerned for the purposes of broadcasting its normal programming;"

(2) Regulation 21 of the Regulations provides that:

"In the event that the party elects to forfeit its allocated PEB air-time, the broadcasting service licensee concerned must not, during the relevant timeslot, in any way vary the sequence or scheduling of PEB(s)."

(3) Regulation 22 of the Regulations provides as follows:

"A broadcasting service licensee or party must not permit or engage in any interference with, or trading in, the sequence or scheduling of PEB(s)."

In respect of Tru FM, we advise that Regulation 6(11) of the regulations prohibits broadcast of a PA immediately after a PEB and the SABC should have put measures in place to circumvent this.

On the basis of the aforegoing, we advise that this will be referred to the Complaints and Compliance Committee ("CCC") for its consideration. We refer to **Compliance and Consumer Affairs (CCA) v South African Broadcasting Corporation (SABC) – SAFM, Radio 2000, Ligwalagwala and Tru FM.**

[3]The ultimate charge sheet read as follows:
The above matter has been referred to the CCC for the following reasons:

1. Background

1.1 The CCA submits that the following public radio stations of the South African Broadcasting Corporation ("the SABC") have contravened the Regulations on Party Election Broadcasts and Political Advertisements Regulations, the equitable treatment of political parties 2014, as amended ("the Regulations"). The radio station are as follows:

i. SAFM;
ii. Radio 2000;
iii. Ligwalagwala FM; and
iv. Tru FM.

2. Summary of the Complaint

During its compliance monitoring activity on elections, 2019 coverage, the CCA detected the following:

2.1. **SAFM:**

i. On 15 April 2019, at 20:45 the radio station transmitted the Democratic Alliance PEB instead of Forum 4 Service Delivery and Vryheidsfront Plus PEB; and

ii. On 16 April 2019, at 09:25 the radio station transmitted the African National Congress PEB instead of the Economic Freedom Fighters and United Democratic Movement PEB thereby contravening Regulation 4 (20) of the Regulations which provides that:

"In the event that a party elects to forfeit its allocated PEB air-time, then such airtime must not be allocated to another party but must be used by the broadcaster concerned for the purposes of broadcasting its normal programming;

2.2 **Ligwalagwala FM:**

On 29 April 2019, at 17:33 and 17:45 respectively the radio station transmitted two African National Congress PEBs one of which was not scheduled by the Authority for transmission at this time, thereby contravening Regulation 4 (14) (b) of the Regulations which provides that:
"a broadcasting service licensee that broadcasts PEB must;
(b) do so in accordance with the sequence and timing that will be determined by the Authority upon allocation of airtime slots after the publication of these regulations"

2.3 **Radio 2000:**
On 13 April 2019 at 18:12:32 the radio station transmitted the Vryheidsfront Plus PEB which was not scheduled by the Authority for transmission at this time hereby contravening Regulation 4 (14)(b) mentioned in para 2.2 above.

2.4 **Tru FM:**
On 02 May 2019 at 17:47 the radio station transmitted the African National Congress's PEB immediately after the Democratic Alliance's PEB thus contravening Regulation 4(17) of the Regulations which provides as follows:

"a broadcasting service licensee must not transmit a PEB immediately before or after another PEB or immediately before or after a PA."

2.5 On 22 July 2019; the CCA advised the Licensee of the alleged contravention **(See annexure A)**

2.6 On 26 July 2019 the SABC responded and conceded to contravention of the Regulations. **(See Annexure B)**

2.7 On 29 July 2019, the CCA advised the SABC that its response that elections are a huge project that maximally stretches the limited human resources of the public broadcaster and that the majority of SABC services have complied with the regulations was not satisfactory as the SABC ought to have put measures in place to prevent non-compliance with the regulations during this critical period. To this end, the CCA advised the SABC that the matter will still be referred to the CCC. **(See Annexure C)**

3*.* **RELIEF SOUGHT**

The CCA seeks the following:

3.1 Appropriate penalties as prescribed by section 17E (2)(b) and (e) of the ICASA Act.

COMPLAINT AND COMPLIANCE COMMITTEE: REASONS AND CONCLUSION

[4] The SABC conceded that it had contravened the said Regulations as set out by the CCA. The SABC, however, informed the CCC that it had broadcast more than 2000 political advertisements. Each advertisement had to be studied so as to ensure that it did not overstep the Regulations and, in fact, under much pressure caused by the usual time constraints connected with a General Election. Although this is typical of an election and foreseen by the SABC, it also foresaw that the likelihood of errors was substantial. The teams worked overtime and much planning went into the project. The staff also had to keep contact with the Election Commission and ICASA so as to ensure that the optimum service would be delivered in the interest of democracy and fairness. In fact, the SABC stated that the relationship with both bodies was courteous and understanding. This was confirmed by the ICASA representatives. They also stated that the relationship with the SABC – in the pursuit of excellence – was collegial and understanding. Nevertheless, the CCA (rightly) had a duty to place the contraventions before the CCC, since the matter is of public importance.

[5] The matter of ownership and control of a licence is a matter of public interest. To only hold licensees who have acted with intention (which includes the foresight of unlawfulness, so-called *dolo malo* conduct) responsible would go against the clear legislative intention to prohibit party political advertisements to be broadcast without, for example, due warning that the

broadcaster is not putting forward its own view. Negligence would thus also be sufficient for a finding to be made against a licensee. There could, of course, be cases of serious negligence (so-called *culpa lata*) which would lead to an increase in the fine imposed. On the other hand there are also cases of lighter negligence (so- called *culpa levis).* There is no ground to find that the omissions by the SABC were intentional. The question is, however, whether the SABC was negligent and whether it could possibly even have amounted to a case of gross negligence, which, in the normal course, would increase the fine. Guidance can be sought from statements of the law by Judges and also at common law.

[6] The legal question is what a reasonable licensee would have done in the same circumstances. In *Re Castell-Castell* 1970 (4) SA 19 (R) Goldin J stated as follows:

The meaning of 'serious negligence' has been considered in a number of reported cases. (See *Bertholdi v Central South African Railways*, 1910 T.P.D. 141 at pp. 143-5; *van Breda, N.O v Victoria Falls & Transvaal Power Co. Ltd.,* 1916 AD 325 at pp. 336, 352, 353; *Johnson v Marshall, Sons & Co. Ltd.,* 1906 A.C. 409 at pp. 411-2, 414 and 414-7; *Van der Heever v Perry,* 1926 S.R. 78). The correct approach, in my view, is to determine in the first place whether the conduct of the appellant constituted or involved negligence, and, if that is found to be the position, it then becomes necessary to decide whether his negligence can be described as 'serious' negligence. In deciding whether the appellant was negligent on the facts of this case, it is necessary to determine whether he was guilty of

'an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent man would not do'….

The appellant was aware of the fact that he should ascertain whether it was safe to pick up the snake and applied his mind to this problem. As I have mentioned before, he examined the snake, he observed the injuries it sustained, that it was motionless, and he placed the butt of his rifle upon the snake's head and it did not display any signs of life. As a person who had handled snakes over a long period of time and was aware of their habits and behaviour, he came to the conclusion that it was safe to pick up the snake.

I am of the view that appellant was guilty, as the ultimate consequences prove, of an error of judgment. It must be borne in mind that the Appeal Board held that it was his duty 'to clear the snake from the road'. There is no evidence, however, to support the conclusion of the Appeal Board

'that he must have known or should have known that if he picked up the snake by the tail there was a risk that it would have bitten him'.

Appellant's evidence, as to how and why he arrived at his decision to pick up the snake and that he was experienced in performing such a task, is not in dispute. There is no evidence concerning what other steps or precautions a reasonable man should or would have taken in these circumstances.

Goldin J stated as follows in *In Re Castell v Castell* 1970(4) SA 22:

The question really is whether he acted in a reasonable and prudent manner in determining whether it was safe to pick up the snake, and on the undisputed facts before me I am of the view that there is no justification for finding that his disability was caused by his negligence. As events turned out, he was guilty of an error of judgment, but that an error of judgment may not amount to negligence is recognized in *Steenkamp v Steyn*, 1944 AD 536 at p. 553, where the CHIEF JUSTICE said:

'Plaintiff misjudged the situation, and that was an error of judgment, but unless such error of judgment was culpable, in the sense that a reasonably careful driver would not have been guilty of it, it was not negligence.'

(See also Rex v Du Toit, 1947 (3) SA 141 (AD) at p. 146).

In my view, appellant's error of judgment on the undisputed facts was such as a reasonably careful person might commit. It is not unusual for reasonable persons or experts to be guilty of an error of judgment which does not amount to negligence. It is obviously necessary to avoid being wise after the event by determining the culpability of a person on the basis of the known consequences of his conduct.

[7] In *Stella Tingas, MV: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* 2003 (2) SA 473 (SCA) Scott JA stated as follows in regard to what gross negligence means: I shall assume, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. Gross negligence is not an exact concept capable of precise definition. Despite dicta which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. (See also *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143C) This must be so. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. (*Van Zyl's* case supra at 557A - E.) If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; but it would then exceed the bounds of our modern-day understanding of gross negligence. On the other hand, even in the absence of

conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence (Van Zyl's case supra at 559D - H). It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. The Roman notion of *culpa lata* included both extreme negligence and what today we would call recklessness in the narrow sense or *dolus eventualis*. (See Thomas *Textbook of Roman Law* at 250.) As to the former, with which we are presently concerned, Ulpian's definition, D50.16.213.2, is helpful: 'culpa lata is extreme negligence, that is not to realise what everyone realises' (*culpa lata est nimia neglegentia, id est non intellegere quod omnes intellegunt*). Commenting on this definition, Lee in *The Elements of Roman Law* 4th ed at 288 describes gross negligence as being 'a degree of negligence which indicates a complete obtuseness of mind and conduct'. Buckland in *A Textbook of Roman Law* 3rd ed at 556 suggests that what is contemplated is a 'failure to show any reasonable care'. Dicta in modern judgments, although sometimes more appropriate in respect of *dolus* eventualis, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); 'a total disregard of duty' (*Rosenthal v Marks* 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (*S v Smith en Andere* 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D). It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the in fact reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

[8]The question before the CCC is not whether the regulations were contravened, since that was rightly conceded, but whether it took place negligently. If not, the finding will be in favour of the SABC.

In *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E the test for negligence was stated as follows by the Appellate Division:

'For the purposes of liability *culpa* arises if -

(a) a *diligens paterfamilias* in the position of the defendant -
  (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
  (ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps. J

. . . Whether a *diligens paterfamilias* in the position of the person concerned would take any steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down.'

[9]The test is thus whether a reasonable public broadcaster, under the same circumstances, would not have made the same errors – of which there were not many. The answer is that given the pressure under which the SABC had to plan and work and the large number of advertisements which had to be considered, it was, indeed, of special interest, that so few errors were made. Of course, a finding that there is no *legal* responsibility, does not remove the fact that the errors were made. An error remains an error. But in law, however, there has not been *negligence*, given the special circumstances and the large number of advertisements with which the SABC had to deal. The SABC acted in accordance with what would be expected in law from a Public Broadcaster: diligence and a clear ideal, based on a striving for excellence. In any case, given the more than 2000 advertisements and the time restraints on the SABC, there had been substantial performance, which is also a defence in law. Although the ideal would consistently be that the legislation and licence conditions must be complied with to the letter, Acting Chief Justice Moseneke stated as follows in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC):

"While our law recognises that *substantial compliance* with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order."

In the present matter the SABC, in the view of the Committee, provided compelling reasons for the errors, of which there were less than one percent

The finding is, accordingly, that although a minor percentage of errors were made, the SABC had not been negligent. It had fulfilled its task with diligence, as is expected from a Public Broadcaster.

The Complaints are, accordingly, not upheld as a result of the absence of negligence.

The SABC is, however, cautioned that if similar errors or a similar error is made in an election period in the next six years, an error or errors referred to above will be taken into consideration in arriving at a decision on negligence and the order advised to Council.

JCW VAN ROOYEN SC

27/11/2019