



COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date heard: 9 October 2020

CASE NR: 371/2019

THAFENG

COMPLAINANT

SOWETO COMMUNITY TELEVISION

RESPONDENT

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

For the Complainant: Mr D Nhlapo from Nhlapo Attorneys

For the Respondent: Mr S Gcayi from SGA Law Africa

Coordinator of the CCC: Ms Lindisa Mabulu and with her Ms Xola Mantshintshi

JUDGMENT

JCW VAN ROOYEN

INITIATION OF THE DISPUTE

[1] By early 2019, except for one, all the directors of Soweto Community Television had resigned. These directors included the Chairperson, Mr Tshepo Thafeng. The latter filed a complaint, dated 6 December 2019, with the Complaints and Compliance Committee at ICASA. In short, he argued that despite an “instruction” from the Complaints and Compliance Affairs (“CCA”) division at ICASA that the remaining director should establish a Task Group

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 by the Council of ICASA or made with 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 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.

which must, within three months, hold a Special General Meeting, the remaining director approached members of the community to become directors. From the documentation filed with the CCC, the said persons were also registered as directors with the Companies and Intellectual Property Commission (“CIPC”) . The CEO of the broadcaster confirmed their appointment for purposes of the said registration.

[2] It should be mentioned that the letter from the CCA made it clear that it was an *advice*, since the word “request” was clearly used. And, rightly so: the CCA is not empowered to issue such an order. That is why it, from time to time, approaches the CCC with an application to make an order against a licensee which, if made, is referred to the Council of ICASA for confirmation and implementation via an order of Council. In fact, monitoring licensees is one of CCA’s functions. It also, at times, provides licensees with (informal) advice when sought. In the present matter the advice from the CCA was that a task team be appointed by the remaining director and that, within three months, an AGM should be held so as to elect directors. In fact, this advice accords with the MOI of Soweto Television: where there is only one director left, he or she must call an AGM for the election of directors. It should be mentioned that the CCC was provided with a new (September 2020) MOI after the hearing of this matter – as undertaken during the hearing by the attorney appearing for Soweto Television. The provision in the earlier MOI that where there is only one director left, he or she must call an AGM, has remained in the new MOI. Added is, inter alia, a list of interest groups which could qualify for representation by way of becoming a member of the company. Where a vacancy on the Board arises, the remaining Directors (or Director) appoint a director from this list of members. In a Supplement to this judgment the 2020 MOI’s provisions in this regard are added.

[3] To the obvious dismay of the Complainant the advice (with respect, incorrectly interpreted by the Complainant as an order) of the CCA was thus not followed. He, then, approached the CCC. Through his attorneys he proposed that the CCC advise Council to issue an order that a Task Team be appointed to do preparatory work so that an AGM be held, where new directors would be appointed. A list of persons from the listening community were proposed for the Task Team, including that of the Complainant.

[4] The attorney representing Soweto TV argued in the opening paragraphs of his written response that the CCC should not even hear this matter. It was, so the argument ran, clear from section 17B of the ICASA Act that the CCC has a discretion not to hear cases. Whilst that is true, this matter is certainly not a matter which should not be heard merely because it would seem that a *prima facie* case had not been made out. Malan J (the later Judge of the Supreme Court of Appeal) stated as follows in a matter where the Acting Chair of the now defunct Broadcasting Monitoring and Complaints Committee (“BMCC”) decided that a *prima facie* case did not exist and thus did not refer a complaint to the

Committee which would, with the Chair, decide on the merits of a complaint. The Judge stated as follows: ²

[30] An exercise of a power would not be lawful if the functionary misconstrues the purpose of a statute and as a result errs on the jurisdictional facts to be taken into account when exercising a discretionary power....Clause 1.16 required the first respondent [the Acting Chairperson of the BMCC] to determine whether the complaint merited a formal hearing. The purpose of the power is to determine whether the seriousness of the allegations and the complexity of the issues that arise and, in particular, the dictates of procedural fairness, require a formal hearing to be convened. *While the substance of the complaint is not irrelevant it is not the only factor to consider when the power conferred by clause 1.16 is exercised.* Where the complaint is not frivolous or vexatious as envisaged by para 1.6 a request for a formal hearing may not be refused simply on the basis that the complaint has *no substance*. Additional factors, such as the *seriousness* of the complaint, the nature of the issues raised and *complexity* of the legal and factual issues, the question whether the parties are willing and able to present evidence and whether the complainant requested a formal hearing, should be considered in the exercise of this power. The first respondent did not have regard to any of these factors. Instead, he first decided that there was no 'merit' in the complaint, on an incorrect understanding of the Constitutional Court's judgment, and then concluded that there was no sound reason for holding a formal hearing. (Emphasis added)

As mentioned above, the CCC is bound by this statement of the law since it deals with exactly the same question: when to hear or not to hear a complainant. In any case, the CCC agrees with the reasoning of Malan J and has often quoted the guideline. One should, accordingly, look wider than whether a *prima facie* case has been made out. Of course, as held by the CCC in *SAPO v Aramex*,³ that does not mean that an unsubstantiated complaint should be heard or that a "fishing expedition" should be undertaken. The CCC, however, also bears in mind that the Constitutional Court has held that the inquisitorial right of the CCC must never be applied unfairly.⁴ However, there was sufficient reason to hear this matter: the directors had diminished to one and steps were taken by the remaining director to rectify the situation. He was the only person left with a vote and over the years only the directors were members who could vote. Which is, of course, legally permissible. The same kind of structure has been found in other companies in matters which have come before the CCC. Of course, in many cases which have come before the CCC, the community is much more involved in the Board - every few years members of the involved community would elect the Board and annual AGM's would be held with the community. In a few matters the licensee consisted of a Trust with trustees who set up the Trust – the Trustees of which tend to remain the same and meet as trustees. The core of a *community* broadcaster does, accordingly, not, of necessity lie in the legal form of the governing body – that depends on the legally acceptable choice of the initiating members. However, the duty to hold meetings with the community

² *SA Jewish Board of Deputies v Sutherland NO & Others* 2004(4) SA 368(W).

³ Case 130/2016.

⁴ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) para [48].

so as to establish the needs of the community insofar as *programming* is concerned, was built into the Community Broadcasting Regulations, as amended, presently, in 2019 – and, in fact has been part of the regulatory regime of community broadcasters since their inception.

[5] It was argued that the remaining director of Soweto Broadcasting Company found himself in an impossible situation. In the past the directors were also members of the Company and, in fact, the only members. The CCA of ICASA advised the Director to appoint a Task Team which would ultimately have led to a General Meeting, where new directors would be appointed. The advice of the CCA at ICASA was a valuable one. The situation was, however, intensely problematic. Soweto Television was faced, inter alia, with an enormous debt of plus minus R14 million to SARS – owing, at the least in part, to previous omissions to file tax returns. Regular clients had also withdrawn their advertisements as a result of a loss of viewers, which resulted from, as argued, a substantial drop in relevant broadcasting material and duplication of programmes. As a result of the fact that financial statements were not complete, no AGM's were held for three years. It should be pointed out that an AGM, within the context of this licensee, would simply have consisted of the directors of the company, since they were the only members of the Non-Profit Company.

[6] According to the Company's pre 2020 MOI a remaining single director had (and still has in the 2020 MOI) one choice, and that is to call an AGM. However, what was lacking was members to call to the meeting. The directors who resigned were no longer members and the directors had been the only members of the company since its inception. The new September 2020 MOI, filed with the CCC (at its request during the hearing) after the hearing, has several provisions as to who would qualify as members of the company – in fact several interest groups are identified as possible members on the Board. An AGM does not, as in the case of a number of other licensees which have appeared before the CCC, in this case, consist of calling registered⁵ members or members (generally) of the community for a meeting. It should be added that Soweto TV has also not registered as a Nonprofit Organisation in terms of the Nonprofit Organisations Act 1997. The absence of such registration, which is not obligatory, does not remove the status of Soweto Broadcasting as a non-profit company – which is, in any case, governed by Schedule One of the Companies Act 2008.⁶

[7] What the remaining director did, in contrast to the advice of the CCA of ICASA, was to approach experienced persons in the Soweto community to assist

⁵ In some cases all adult members within the geographical range qualify, whether registered or not. This depends on the Constitution of the radio station. Compare CCC judgment *IN RE: KARABO FM 308 /2018* and *Newcastle Community Members v Newcastle Community Radio 312/2018*.

⁶ Compare section 13 of the Nonprofit Organisations Act 1997. Also compare *Schedule One* of the *Companies Act 2008*.

him in addressing the intense problems of the radio station. He appointed them as interim directors and also registered their positions with the CIPC. To demonstrate the *bona fides* of the remaining director, he personally provided a loan of R2 million, interest free, to the broadcaster. Other new directors also assisted with what is termed “soft loans” and the revamping of the broadcaster has, convincingly, been shown at the hearing of this matter, including a new MOI, approved on 9 September 2020.

THE DISPUTE

[8] In contrast to what was argued by the Complainant, Soweto’s legal representative argued that the CCA does not have the authority to order a licensee to act in a certain manner. As pointed out above, this was clearly not the intention of the CCA – it was a mere advice. It is, accordingly not necessary to deal with the first seven paragraphs of the argument put forward by the said legal representative. Parts of the balance of the written argument are broadly set out hereunder (numbers adapted):

[9] The legal representative for Soweto TV argued as follows:

On 27 May 2019 the Authority was informed that directors of Soweto TV, with the exception of Mr. Nkutha, had resigned. As the sole director of Soweto TV at the time, Mr Nkutha considered it appropriate to take steps to get the company on its feet again. As such, Mr. Nkutha understood it that he had no legal obligation to work with his subordinates in the executive management in the establishment of the Task Team, although he elected to involve Ms Bridgette Nkuna (a former CEO) as a member of the Team.

The work of establishing the Team was completed between July and August 2019, since Mr.Nkutha had held a series of meetings with various persons who were being considered as having the requisite skills and experience to assist Soweto TV in the dire position in which it found itself. Ultimately, on 6 August 2019, the Team took shape and held a meeting in which it was able to take stock of the affairs of the Company. The Team resolved in that meeting to issue a letter to the Authority to update it on its composition as well as its work programme. Key to the work programme of the Team, as set out in the letter, was a fact finding audit and an organisational review process designed to inform amongst other things:

- a clear understanding of the state affairs of Soweto TV;
- an understanding of the requirements of Soweto TV; and
- an understanding of the governance requirements that would inform amendments of the MOI, which would deal with, amongst

other things, the future member composition of the Company, elections and appointments of directors.

Throughout the series of interactions that were ongoing with the members, Mr. Nkutha was regularly applying his mind independently as the sole director of the Company to the optimum governance mechanism that was required to take the the Company forward, in particular to: amend the MOI; and convene an elective Annual General Meeting. Mr. Nkutha was alive to the inherent limitations that he had as a single director that: (1) he had no legal powers to amend a MOI acting alone; and (2) could not convene and preside over an AGM, since the company had no members to call to such a meeting - the other members having resigned.

Article 5.3.6 of the (earlier) MOI clearly stipulates that "*No single director may directly or indirectly control decision making powers of the company.*"

Guided by the provisions of Article 5.3.6 of the MOI, Mr. Nkutha, acting independently and desiring to avoid any inherent legal risk of acting as a single director, arrived at the decision that, as the *sole member* of the Company, he assumed powers to appoint and elect directors of the Company to assume decision making powers on behalf of the Company.

Mr. Nkutha noted that at all times the Company had been in operation since 2004, directors were always regarded to be (the only) members and affairs of the Company were conducted with this understanding, which had never been challenged before – also not on renewal of the license by ICASA.⁷

New directors were thus appointed and they were registered with the CIPC – the CEO confirming that they had been appointed as directors. The Company's debt with SARS was brought down to R4 million from R14 million, new shows were broadcast and companies again commenced purchasing advertising time. The viewership became substantial again and business, on the whole, was normalising.

[10] After the close of the hearing, the Respondent was asked through its attorney whether the Company was registered as a Non-profit Organisation in terms of the Non-profit Organisations Act 1997.⁸ The answer was that no one at

⁷ Which was legally correct, since it is clear that the holder of a licence may have any legally acceptable structure – and here it was a non-profit company, which is recognised in terms of Schedule One of the Companies Act – section 21 of the Companies Act having been repealed in 2008.

⁸ The possibility for a so-called section 21 company fell away in the amended 2008 Companies Act.

the Station could remember such a registration. Of course, such registration is not obligatory. In the absence thereof this meant that it remained a Schedule One Company in terms of Companies Act 2008 - thus, a non-profit company.

CONCLUSION

[11] According to the licence of Soweto Television the license is held by a non-profit company. The ECA provides as follows in regard to a Community Broadcasting licensee:

50. Community broadcasting service licences

In considering the grant of a new community broadcasting service licence the Authority must, with due regard to the objects and principles enunciated in section 2, among others, take into account whether -

- (a) the applicant is fully controlled by a non-profit entity and carried on or is to be carried on for non-profit purposes;
- (b) the applicant intends to serve the interests of the relevant community;
- (c) as regards the provision of the proposed broadcasting service, the applicant has the support of the relevant community or of those associated with or promoting the interests of such community, which support must be measured according to such criteria as may be prescribed;
- (d) the applicant intends to encourage members of the relevant community or those associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and
- (e) the applicant has never been convicted of an offence in terms of this Act or the related legislation.

[12] Section 1 of the ECA provides that a “community broadcasting service” means a broadcasting service which -

- (a) is fully controlled by a non-profit entity and carried on for non-profit purposes;
- (b) serves a particular community;
- (c) encourages members of the community served by it or persons associated with or promoting the interests of such community, *to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service*; and

- (d) may be funded by donations, grants, sponsorships or advertising or membership fees, or by any combination of the aforementioned;
(accent added)

[13] The Broadcasting licence, renewed in 2017 for a period of seven years, provides that the control of the station shall vest in the Board of Directors of a non-profit organisation known as Soweto Community Television. In so far as the community is concerned, the licence provides for the participation of community members in the affairs of the station in the following ways:

(1) The licensee shall hold at least two meetings annually with its community on programming and programming-related matters for the selection and provision of programmes.

(2) The Licensee shall furnish the Authority with proof of such meetings as well as the attendance thereof by members of the community.

(3) The Licensee shall hold Annual General Meetings for the following purposes: to provide feedback on the licensee's compliance with licence conditions; to provide feedback on the licensee's operational and financial performance; *and to elect members of the controlling structure e.g. Board of Directors, Trustees etc. subject to the licensee's founding documents.*(italics added)

[14] Given the date of the complaint (29 November 2019), which could only now be heard (9 October 2020) as a result of the COVID Pandemic restrictions, the matter is regarded as urgent. Certainty must also be provided to the licensee which has, in the meantime, brought its debt to SARS down to more or less R4 million – a remarkable achievement - and is in the process of achieving high standards of broadcasting and reaching substantially more viewers. The only reasonable inference that can be made is that the team, under the direction of Mr Nkutha, has been enormously successful in getting the licensee back on track.

[15] The main question is, however, whether the Board is presently legally constituted. Judged against the earlier MOI, which applied when the directors resigned, it is not. However, it has often been stated by our Courts and also by Courts of England (the legal procedures of which have substantially influenced our legal procedures) that “the Law is not an Ass”. In fact, Chief Justice Mogoeng recently stated as follows in *Public Protector v SA Reserve Bank* 2019(6) SA 253(CC):

[40] After all, courts exist not to crush or destroy, but to teach or guide, caution or deter, build and punish constructively. And that ought to be the purpose of the law in our constitutional dispensation, considering our injustice-riddled past. The law ought not to be applied mechanically, regardless of whether the outcome yields justice or inequity. For then it could be the ass that it has occasionally been allowed to be prior to our current constitutional dispensation.(italics added)

[16] Given this approach to the Law the first issue is whether the CCC and thus the ICASA Council has the authority to declare the resolutions taken by the sole director invalid since the appointment of directors did not accord with what would apply in the normal course: an AGM would be held where the members are present. The only members of the Company, other than the remaining director, were the directors. And, they had stepped down and lost their membership. Since the Law does not hold one to the impossible⁹ and there were no members, except Mr Nkutha, the latter decided to co-opt members and work towards re-establishing normality. The new September 2020 MOI is clearly intent upon drawing in interest group representatives as members, who would then elect a Board of Directors.

[17] In any case, given the fact that the Companies and Intellectual Property Commission (“CIPC”) has registered the new directors, the only remedy for the Complainant would be to take the decision of the CIPC on review to the High Court. The CIPC is an organ of state as clearly appears from section 185 of the Companies Act 2008, which provides as follows:

185. Establishment of Companies and Intellectual Property Commission

- (1) The Commission is hereby established as a juristic person to function as an **organ of state** within the public administration, but as an institution outside the public service.
- (2) **The Commission-**
 - (a) **has jurisdiction throughout the Republic;**
 - (b) **is independent, and subject only to-**
 - (i) the Constitution and the law; and
 - (ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;
 - (c) must be impartial and perform its functions without fear, favour, or prejudice; and
 - (d) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in-
 - (i) the most cost-efficient and effective manner; and
 - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.

⁹ *Nowmedia v SAPO* (Case 126/2015); *Gassner v Minister of Law and Order and Others* 1995 (1) SA 322 (C); *Frajenron (Pty) Ltd v Metcash Trading Ltd and Others* 2020(3) SA 210(GJ) in which the requirements for a successful defence of impossibility are set out.

- (3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.**
- (4) Except to the extent prescribed otherwise by or in terms of this Act, a certificate, notice, decision, determination or ruling issued or made with respect to any particular matter contemplated in this Act by-
- (a) the Commissioner; or
 - (b) *a person designated by the Commissioner to perform a particular function of the Commission, is the certificate, notice, decision, determination or ruling of the Commission with respect to that matter.*)(Italics added)

[18] It could be argued that the CCC has, in the past, advised Council to order that an AGM be held within a certain period - now, however, only after the lifting of the COVID restriction. Those instances, however, related to cases where the constitution of the broadcaster provides that members that are registered as members may vote at an AGM or an alternative meeting, as stated in its licence; or in some instances, that any adult who is able to show that she or he lives within the broadcast area may vote. In these cases names and addresses would, in the ordinary course, be required. However, there have been instances, such as in the matter of *Motheo FM*(Case 342/2019) where the members, in the range of 21, were limited to persons who had joined as members, as per the Constitution of the radio station. In the present instance Soweto Television has been operating with a small number of members, who were all directors as per its MOI. Its licence has been renewed by ICASA without any objection as to the limited members. And, rightfully so: the main duties of the Board, according to the 2019 Regulations, is to obtain the inputs of the community as to programming – and this is not part of the present complaint. In fact, the Electronic Communications Act and the 2019 Community Licensees Regulations are not prescriptive as to the nature of the licensee – it could be a non-profit company or a Trust or an individual. Section 2(y) of the ECA also provides that ICASA must “refrain from undue interference in the commercial activities of licensees while taking into account the electronic communication needs of the public.”

[19] What must be done, is to give effect to the MOI 2020 whereby interest groups would be identified for membership and the community would be represented more effectively than in the past. Giving effect to this MOI would be in the public interest and, once again, it fits in well with the concept of a community license – in fact, much more effectively than the original MOI.

FINDING

[20] The CCC conclusion which is reached is, accordingly, as follows:

(a) The remaining director has, in an impossible situation, acted in the public interest. He was left in an *impossible* situation by his co-directors and he has made the best of it. In fact, the licensee is back on its feet. Impossibility is a defence in law and the remaining director had no choice but to co-opt persons who would act as directors – and were registered by the CIPC as directors – the CIPC being an organ of state entrusted with this task by Parliament in 2008. And, as stated by the Chief Justice, quoted earlier, “the Law is not an Ass” which cannot adapt to different situations. And this is what the single director did.

(b) He and the CEO took the necessary steps to have these persons registered as Directors by the Companies and Intellectual Property Commission. A final recognition by the organ of State entrusted by Parliament with this authority. The resolution of the CIPC may only be set aside by a Court of law on review - if grounds for review exist.

ADVICE TO COUNCIL OF ICASA FOR THE FUTURE

[21] So as to ensure legal certainty for the future, the following order is advised to the Council of ICASA:

1. That within 60 working days from when the COVID restriction is lifted in terms of the ICT COVID-19 National Disaster Regulations (as amended) the CEO, as instructed by the Board, between the hours of 07:00-08:00 and 18:00-20:00, for twenty one working days advertises on television and on its website that persons of 18 and older who live within the broadcasting range as per its licence (greater Soweto area) of Soweto Television may apply for membership of the company so that they may elect a Board of Directors at a Special meeting of the company.

2. That the advertisement must include that an application form must be filled in as set out on the Station’s Website or as obtained from the Office of the radio station (*with station’s street address*) or per email (*with station’s email address*).

3. That the CEO of the radio station must, if the applicant lives within the broadcasting range as per its licence (greater Soweto area), issue the membership by notifying the applicant per email or postal service and stating that he or she must at the meeting, as set out in paragraph 4 below, be in possession of the required proof of membership to enter the meeting place and vote.

4. That the Board within 40 working days thereafter on a Saturday or a Sunday between the hours of 14:00 and 19:00, at a specified readily accessible place within the broadcasting range, hold a Special Members meeting which is daily advertised for 21 working days on television between the hours of 07:00-08:00 and 18:00 - 20:00.

5. That as main item a Board of Directors, including a Chair and Deputy Chair, of 8 be elected from the members by majority vote at such a meeting for a term of three years.
6. That the election be chaired by a legal practitioner (advocate/attorney) appointed by the Board; with the CEO or his or her nominated employee acting as Secretary.
7. That a General Members Meeting be held annually and advertised as set out in 4 above.
8. That a representative of the ICASA CCA be invited to the said meeting within 21 working days' notice.

A handwritten signature in black ink, reading "J.C.W. van Rooyen". The signature is written in a cursive style with a large initial 'J'.

Prof JCW van Rooyen SC
The Members of the CCC agreed.
31 January 2021

