

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

Date of Hearing: 16 September 2016

CASE NUMBER 206 /2016

IN RE: VOICE OF TEMBISA FM 87.6

**PANEL:** Prof JCW van Rooyen SC  
Councillor Nomvuyiso Batyi  
Mr Jack Tlokana  
Ms Mapato Ramokgopa

From Voice of Tembisa: Mr Sonnyboy Masingi (Station Manager)  
From Broadcasting Compliance: Ms Fikile Hlongwane (Manager)  
Coordinator: Ms Lindisa Mabulu

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## JUDGMENT

**JCW VAN ROOYEN SC**

### BACKGROUND

[1] Voice of Tembisa FM 87.6 is a community broadcaster in terms of the Electronic Communications Act 2005 (“ECA”). It broadcasts in Sesotho, Nguni and English within a radius of 50 kilometres and has in the range of 210 000

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<sup>1</sup> An Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. The CCC was recognised as an independent tribunal by the Constitutional Court in 2008. It, inter alia, decides disputes referred to it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides whether complaints (or internal references from the compliance division or inspectors 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 sanction 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. A licensee, which is affected by the sanction imposed, has a right to be afforded reasons for the Council’s imposition of a sanction. In the normal course, where Council is satisfied with the reasons put forward to it by the Complaints and Compliance Committee, further reasons are not issued. The final judgment is, on application, subject to review by a Court of Law.

listeners. Tembisa is a large town situated to the north of Kempton Park on the East Rand, Gauteng.

[2] The station was referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA since it had, allegedly in conflict with regulation 6(13) of the *Regulations on Party Election Broadcasts, Political Advertisements, the Equitable Treatment of Political Parties by Broadcasting Licensees and Related Matters in Respect of Municipal Elections Broadcasting* (as amended), broadcast three political advertisements after each other directly after the first political advertisement on the 11th July 2016 after 21:00. The Regulation provides as follows:

“A Broadcasting Licensee must not transmit a political advertisement immediately before or after another political advertisement.”

A political advertisement is defined in section 1 of the Electronic Communications Act 2005(“ECA”) as follows:

“**political advertisement**” means an advertisement broadcast on a broadcasting service which is intended or calculated to advance the interests of any particular political party, for which advertisement the relevant broadcasting service licensee has received or is to receive, directly or indirectly, any money or other consideration;

[3] In terms of section 56 of the ECA a political advertisement may only be broadcast during an election period. An “election period” is defined by the ECA as “the period commencing with the date on which the election is proclaimed and ending on the day immediately following upon the day on which candidates of any of the political parties are declared elected.” Political advertisements may, in accordance with section 58(6) of the ECA, only be broadcast from the day on which an election is proclaimed up to 48 hours prior to the polling period commences – which, in this case, was at 07:00 on the 3<sup>rd</sup> of August 2016. The election on 3 August 2016 was proclaimed in the *Government Gazette* by the Minister of Cooperative Governance and Traditional Affairs, Mr D van Rooyen, on 23 May 2016 after he had signed the notice on 22 May 2016 in terms of the Local Government: Municipal Structures Act 1998.

## THE MERITS

[4] There was no contravention of section 56 read with section 58. The question is, however, whether the above mentioned regulation 6(13) had been contravened negligently or intentionally.

[5] After having been informed of the alleged contraventions by the Broadcasting Compliance Unit at ICASA, the manager of the radio station acknowledged that a contravention had taken place. Both he and the presenter of a talk show were unaware that the advertisements were broadcast. At the hearing the manager explained that the presenter of the talk show that evening had found it necessary to make a call to a listener who had called in earlier. He then simply pressed a button, which led to the three political advertisements following directly upon the first political advertisement. The advertisements had not been scheduled for broadcast at that time or around that time at all.

[6] There is no doubt that the three political advertisements were broadcast directly after each other and after the first political advertisement. Only when the notice from the ICASA Broadcasting Compliance Unit reached the station manager, he became aware of this. The presenter was also unaware that the advertisements were broadcast. When made aware of this he apologized and this apology was communicated to the CCC at the hearing and, also before that, to the Compliance Unit. No disciplinary steps were taken internally and, as indicated by the Station Manager what happened was regarded by the station as an error that could, very well, be made in the ordinary course of broadcasting.

[7] The ultimate question is, however, whether there was negligence on the side of the presenter. This is so since, even if there had objectively been a contravention of the said regulation, the question remains whether the radio station had been negligent – which would be dependent on the question whether the presenter had been negligent as an employee. This legally *implied* requirement of negligence is discussed in the following paragraphs.

[8] The approach in such cases was described as follows in *S v Arenstein* 1964 (1) SA 361 (A) at 365C-D:

The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. (*R v H* 1944 AD 121 at 125, 126; *R v Wallendorf*

*and Others* 1920 AD 383 at 394.) Indications to the contrary may be found in the language or the context of the prohibition or injunction, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of mens rea. (*R v H* (supra at 126).)<sup>2</sup>

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP*:<sup>3</sup>

[86] The general rule of our common law is that criminal liability does not attach if there is no fault or blameworthy state of mind. This is expressed by the maxim: *actus non facit reum nisi mens sit rea* (an act is not unlawful unless there is a guilty mind). The fault element may take the form of either intention or negligence. This is true of both common law and statutory offences. (Footnotes omitted)

Also Justice Cameron (with whom four other Justices of the Constitutional Court concurred) stated as follows in *Democratic Alliance v African National Congress*:

[154] a further issue needs to be addressed. This also follows from the ground rule of our law that penal provisions must be strictly construed. There is no suggestion, and the ANC did not claim, that the DA sent out the SMS knowing that what it said constituted 'false information'. This means that, in law, the author acted innocently. And the requirement of a guilty mind 'is not an incidental aspect of our law relating to crime and punishment, it lies at its heart'. *Strict criminal liability is therefore not easily countenanced. There is thus an interpretative presumption that a penal prohibition includes a requirement of fault. It will be read to do so unless there are 'clear and convincing indications to the contrary.*<sup>4</sup> (Emphasis added and footnotes omitted)

There are also several judgments of the Supreme Court of Appeal and its predecessor<sup>5</sup> which include knowledge of possible unlawfulness as a requirement for responsibility where intention is required by a statute.<sup>6</sup> The authorities are also clear that the rule is also applicable where negligence is regarded as sufficient for a contravention. Thus even ignorance of the law may be a defence where the accused or respondent did not know or had no reasonable grounds to know the law.<sup>7</sup> Ignorance of the law was, however, not

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<sup>2</sup> See further *S v Qumbella* 1966 (4) SA 356 (A) at 364D-G; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H-611A; *S v De Blom* 1977 (3) SA 513 (A) at 532B-D.

<sup>3</sup> 2014 (5) SA 317 (CC).

<sup>4</sup> 2015(2) SA 232(CC).

<sup>5</sup> The Appellate Division of the Supreme Court.

<sup>6</sup> Which includes so-called *dolus eventualis*: that is foresight of the possibility of unlawfulness and nevertheless acting – see *S v De Blom* 1977 (3) SA 513 (A).

<sup>7</sup> *S v De Blom* 1977(3) SA 513(A).

the defence put forward in this matter. The defence was simply that an error had been made by the presenter.

[9] There are no indications, as set out above, than an innocent violation of the regulation would also amount to a contravention in law. There was no evidence that the presenter contravened the regulation knowingly. Ultimately, the question is, accordingly, whether the presenter was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case a presenter at a radio station, *should* have known that the three political advertisements followed directly upon the first political advertisement.

[10] Although the CCC has understanding for the difficult task of a presenter who also has to act as a continuity manager, we are of the view that the presenter, and thus the radio station, was negligent. The Broadcasting Compliance Division of ICASA had held information sessions on the duties of a broadcaster during an election period. This, plus the mere fact of the municipal election, should have placed the station and its presenters on special caution. The intention of Regulation 6(13) is that political advertisements should not be broadcast directly after each other, since that could confuse the listeners as to which political party was on air. And such confusion is at odds with the Constitution of the Republic of South Africa 1996, which guarantees free and fair elections,<sup>8</sup> - a guarantee which has been emphasised by the Constitutional Court as a cornerstone of our new democracy.<sup>9</sup>

## **FINDING**

[11] In the result the CCC finds that the radio station has been negligent in having broadcast the three advertisements directly after the first advertisement.

## **ADVICE AS TO THE ORDER BY COUNCIL**

[12] As to the order by Council the usual possibilities as set out in section 17E(2) of the ICASA Act would apply. These possibilities must be read with section 4(3)(p) of the ICASA Act which (as amended from 2 June 2014) provides as follows:

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<sup>8</sup> Cf. section 19 of the Constitution of the RSA: (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

<sup>9</sup> See *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); *DA v ANC* 2015 (2) SA 232 (CC).

(p) except where section 74(1) of the Electronic Communications Act applies, (the Authority) must determine a penalty or remedy that may be appropriate for any offence of contravening any regulation or licence condition, as the case may be, contemplated in this Act or the underlying statutes, taking into account section 17H;

Regulation 6(13) is, indeed, an instance where no penalty in the form of a fine is prescribed. The radio station has a clean record and has not made any additional income from the advertisements, since they were not scheduled at all. In determining a just sanction, it should also be borne in mind that the radio station is a community broadcaster where sharing of profits does not take place. The station is not funded by external sources, except in so far as assistance is provided by the Department of Communications for equipment. Its only source of income is from advertisements. It has around 210 000 listeners, which is not particularly large. The evidence was, furthermore, that advertisements are not usually broadcast during talk shows. In that sense, the presenter was not aware of the possibility of advertisements during his show. That is why he must confidently have pressed the continuity button, believing that music would follow and then solely attended to his telephone call to a listener.

A fine would, nevertheless, demonstrate the concern which the Authority has about the negligence and it was decided to advise a fine of R2000.

An apology should also be broadcast for this error.

**The proposal to Council is accordingly:**

[1]The station must broadcast once per day for **five** consecutive days as its **first** item on its **news** service the following statement at a time between 07:00 and 20:15 – the first broadcast being within five days of being notified by ICASA of this judgment.

(Such times being notified by email to the Coordinator of the CCC at least 24 hours before the broadcast and such broadcast not being accompanied by any background music or sounds and the item being read formally as part of the News by the **Station Manager, who must declare on air that he is the Station Manager**). The statement must be as follows:

*Komishine e Ikemetseng ya Matla a Dikgokahanyo ya Afrika Borwa e fumane hore seteishene sena sa kgaso se ile sa hlokomoloha ho sa latele Melawana ya Dikgetho. Re le seteishene sa kgaso re ile ra hasa dipapatso tse tharo tsa*

*lipolotiki, nakong ya dikgetho tsa masepala, hang ka tatellano ka morao ho engwe ya papatso ya lipolotiki eleng se kgahlanong le Melawana ya Dikgetho ya ICASA. Seteishene sena se rata ho fetisetsa kopo ya tshwarelo ya sona ho bamamedi ba sona le ICASA bakeng sa ditlolo tse.*

[The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Regulations. We broadcast three political advertisements, during the municipal election period, immediately after a political advertisement. This station extends its apology to its listeners and ICASA for these contraventions.]

An electronic copy of each broadcast, with time of broadcast, must be sent to the Coordinator of the Complaints and Compliance Committee by e-mail within 48 hours from the last broadcast.

[2] Secondly a fine of R2000 must be paid to ICASA within thirty calendar days from when the judgment is issued. The Coordinator will provide the radio station with the bank details of ICASA and she must be copied with proof of payment within 24 hours from when the payment was made.

*J. C. W. van Rooyen*

JCW van Rooyen SC  
Chairperson of the CCC.

21 September 2016

The Members who were on the panel for this case concurred.