COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 16 September **CASE NUMBER: 215 /2016**

IN RE: SOUTH AFRICAN BROADCASTING CORPORATION LTD (UKHOZI FM)

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

CCC: Coordinator: Ms Lindisa Mabulu

From the SABC: Mr P Moilwa (General Manager: Policy and Regulatory Affairs) Ms N Monyela (Manager: Policy and Regulatory Affairs), Mr N Shibambo (Acting Manager: Regulatory Compliance), Mr A Matthee (Commercial Enterprises) and Mr Stephen Harrigan (Engineering)

From Broadcasting Compliance ICASA: Ms Fikile Hlongwane (Manager)

JUDGMENT

JCW VAN ROOYEN SC

BACKGROUND

[1] 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.
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[1] Ukhozi FM is one of the radio broadcasters of the South African Broadcasting Corporation. For ease of reference we will refer to the respondent as Ukhozi FM. Two election broadcasts of Ukhozi FM were referred to the Complaints and Compliance Committee by the Broadcasting Compliance Division of ICASA. Ukhozi FM had, allegedly in conflict with regulation 4(15) 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 a political advertisement ("PA") of the Inkatha Freedom Party which was, immediately, followed by a party election broadcast ("PEB") of the Economic Freedom Fighters. Regulation 4(15) provides as follows:

"A Broadcasting licensee must not transit a PEB immediately before or after another PEB or immediately before or after a PA."

[2] In terms of section 56 of the Electronic Communications Act 2005 ("ECA") a PEB and a PA 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." PA's and PEB's may, however, in accordance with section 57 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 3rd 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.

[3] There was no contravention of section 56 read with section 57. The question is, however, whether the above mentioned regulation 4(15) had been contravened.

MERITS OF THE DEFENCE

[4] After having been informed of the alleged contraventions by the Broadcasting Compliance Unit at ICASA, the SABC responded that it conceded that the broadcasts did take place as alleged, but that it took place as a result of

a mechanical failure. The two broadcasts were not mechanically set to follow immediately upon each other. Two commercial advertisements had been programmed between them, as was demonstrated by a copy of the programme which was made available to the CCC. However, a "technical glitch" "pushed" the IFP advertisement ahead to the segment immediately before the EFF election broadcast. At the hearing Mr. Moilwa, acknowledging that a contravention had taken place, informed the CCC that the SABC staff, who were involved in the placing of advertisements, had been unaware of this problem with the system. The SABC is presently planning to replace the system.

[5] The defence set out in the previous paragraph could amount to a defence of impossibility of performance, which is a defence in our law.[2] Compare the incisive analysis of impossibility as a defence by Judge Van Zyl in *Gassner NO v Minister of Law and Order and Others* 1995 (1) SA 322 (C). The learned Judge, inter alia, stated as follows:

In criminal law the maxim *lex non cogit ad impossibilia rather* than *impossibilium nulla obligatio est* has featured prominently. It has usually occurred where an Act of Parliament or similar statutory enactment has demanded compliance, under appropriate circumstances, with an obligation or some other form of positive conduct. If such obligations or conduct should be objectively impossible and not have been caused by the person pleading impossibility, the maxim may be applicable.

This has been the approach in a number of South African cases. See R v Mostert 1915 CPD 266 (impossible to give a stamped receipt in terms of s 18(3)(b) of Act 30 of 1911); R v De Jager 1917 CPD 558 (impossible to procure a taximeter as required by reg 706 of the Cape Town Municipal Regulations framed under Ordinance 10 of 1912); R v Harris 1919 CPD 216 (impossible to obtain a hydrometer for establishing whether water has been added to brandy in contravention of s 8 of Act 15 of 1913); Jetha v Rex 1929 NPD 91 (impossible to attend a meeting of creditors in terms of s 142(a) of Act 32 of 1916); S v Mafu 1966 (2) SA 240 (E) (impossible to comply with curfew regulations contained in Proclamation 194 of 1934); S v Moeng 1977 (3) SA 986 (O) (impossible to obtain a 'passbook' in accordance C with s 15(1)(a)(i) and (ii) of Act 67 of 1952 as amended)...

In a number of other cases the maxim was considered, expressly or by implication, but held not to be applicable. See R v Close Settlement Corporation Ltd 1922 AD 294; R v Korsten 1927 NPD 12; Attorney-General v Grieve 1934 CPD 187; R v Hoko 1941 SR 211; R v Hargovan and

[2] Compare the CCC judgment in *Nowmedia v SAPO* (Case 126/2015)

Another 1948 (1) SA 764 (A); R v Adcock 1948 (2) SA 818 (C); R v Canestra 1951 (2) SA 317 (A); S v Block 1967 (4) SA 313 (C); S v Leeuw 1975 (1) SA 439 (O); S v Concalves 1975 (2) SA 51 (T)…

'Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, Lex non cogit ad impossibilia, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse.'

[6] From the above analysis of the law and from further case law quoted by Judge Van Zyl it is clear that full details must be provided of the facts on which the alleged impossibility is based. In the present matter the SABC did not provide expert evidence as to how the mechanical failure took place and it is, accordingly, not possible for the CCC to base its decision on impossibility of performance.

[7]The second question is, however, whether there was negligence on the side of Ukhozi FM. This is so since, even if there had objectively been a contravention of the said regulation, the legal question remains whether the radio station had been negligent. This legally *implied* requirement of negligence is discussed in the following paragraph.

[8] The approach 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).)' [3]

Chief Justice Mogoeng, dealing with offences generally, stated as follows in *Savoi v NDPP:* [4]

[3] 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.

[4] 2014 (5) SA 317 (CC).

[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*.[5] (Emphasis added and footnotes omitted)

There are also several judgments of the Supreme Court of Appeal and its predecessor[6] which include knowledge of possible unlawfulness as a requirement for responsibility where intention is required by a statute.[7] The authorities are also clear that the rule is also applicable where negligence is regarded as sufficient for the 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.[8] Ignorance of the law was, however, not the defence put forward in this matter. The defence was simply that the mechanical system had failed.

[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 Ukhozi FM contravened the regulation knowingly. Ultimately, the question is, accordingly, whether the radio station was negligent in not abiding by the regulation. Negligence is present where the reasonable person, in this case the relevant employee(s), *should* have known that the two political features could follow directly upon each other.

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[5] 2015(2) SA 232(CC).

[6] The Appellate Division of the Supreme Court.

[7] 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).

[8] *S v De Blom* 1977(3) SA 513(A).

[10] Although the CCC has understanding for the complicated tasks of a radio station, it is of the view that the tasked employee was or employees were, in the absence of *expert* evidence as to the nature of the mechanical failure, negligent in not having ensured that the failure would not take place. The mere fact of the municipal election, should have placed the radio station on special alert. The intention of the Regulations is that political advertisements and/or election broadcasts should not follow upon each other. This ensures the identification of individual broadcasts and that the listening public would not be confused – in this case, by a political advertisement and an election broadcast and, in any case, the alignment of the broadcast to a particular political party. The Constitution of the Republic of South Africa guarantees free and fair elections,[9] a guarantee which has been emphasised by the Constitutional Court as a cornerstone of our democracy.[10] Fairness requires the said broadcasts to be clearly separated from each other.

FINDING

[11] In the result the CCC finds that the radio station was negligent in having broadcast the two items directly after each other.

ADVICE AS TO THE ORDER BY COUNCIL

FINE

As to sanction 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:

(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 4(15) is, indeed, an instance where no penalty in the form of a fine is prescribed. However, as indicated above, the Council of ICASA may determine a penalty or remedy that may be appropriate in such cases. The CCC, in its advice on sanction to Council, believes that a fine would be appropriate in this instance.

[9] 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.

[10] See *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC); *DA v ANC* 2015 (2) SA 232 (CC).

Since the negligence was not gross and the broadcast did not, for example, take place within the forbidden 48 hours before the polling period, which is a serious contravention, a fine of R5000 would be fitting.
The SABC has a suspended fine of R35000 against it. The suspension reads as follows:
"(2) That the SABC pays a fine of R50 000 to ICASA within 30 calendar days from the date on which this order is published by ICASA. R35000 of the R50 000 is suspended for three years. Which would mean that if the SABC were found by the Complaints and Compliance Committee to have been in contravention of section 56 read with section 58(6) of the Electronic Communications Act during the said three years, it would add R35 000 to any sanction advised to Council at that stage and that Council would implement such fine."

From the above order it is clear that the suspended R35000 is only activated if the SABC, after the said suspended fine was imposed by the Council of ICASA, is again found to have been in contravention of section 56 read with section 58(6) of the ECA. The present finding is in terms of Regulation 4(15) and, in any case, the omission took place before the said broadcast for which a suspended fine was imposed.

APOLOGY
An apology must be broadcast five times over the News Service of Ukhozi FM. This accords with the approach in other similar election cases.

THE ADVICE TO COUNCIL AS TO SANCTION

[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.

The wording of the statement to be broadcast must be as follows:

Inhlangano Elawula Ezokuxhumana eNingizimu ne Africa, phecelezi ICASA ikhiphe isinqumo esigweba lesisiteshi ngokuthi asizange sihambisane nemithetho elawula ukubika ngokhetho. Iphutha lethu kwaba ukusakaza imibiko eqhakamisa amaqembu epolitiki (phecelezi Party Election Broadcast and political advert) ngokulandelana eduze ngomhlaka 26 Ku Ntulikazi (phecelezi July) ezinsukwini ezandulela ukhetho lukamasipala. Siyaxolisa kakhulu kubalaleli bethu kanye ne ICASA ngaleliphutha.

[The Independent Communications Authority of South Africa has found that this station was negligent in not having abided by the Election Regulations. We broadcast a political election broadcast directly after a political advertisement on the 26th July, during the municipal election period. This station extends its apology to its listeners and ICASA for this 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 R5000 must be paid to ICASA within thirty calendar days from when the judgment is issued. The Coordinator will provide the SABC 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 17 October 2016
Chairperson of the CCC.