

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

Date heard: 11 December 2019

CASE: 361 /2019

### IN RE VAAL COMMUNITY RADIO

Tribunal

Prof JCW van Rooyen SC (Chairperson)  
Councillor Dimakatso Qocha  
Mr Peter Hlapolosa  
Mr Mzimkulu Malunga  
Dr Jacob Medupe  
Mr Jack Tlokana

On behalf of the Vaal Community Radio: Adv Elreza De Beer instructed by Mr. G Bochove from De Beer & Claassen Attorneys Sasolburg,

On behalf of the Licensing Division at ICASA: Attorney David Maphakela from Mashiane Moodle & Monama Attorneys accompanied by Ms. Ntombifuti Nkelane (Candidate Attorney) and Mr Thabo Ndhlovu (Manager: Licensing, ICASA);

Coordinator of the CCC: Ms. Lindisa Mabulu and with her Mr S Plaaty.

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### PRELIMINARY RULING 22 October 2019

JCW van Rooyen

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<sup>1</sup> 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.

- [1] Vaaldriehoek Community Radio has filed a complaint with the Coordinator of the Complaints and Compliance Committee. The complaint essentially boils down to its having been informed by the relevant Division at the ICASA that since its license had expired and it had not, as required in terms of the Electronic Communications Act 2005 as amended, applied for a renewal six months before it expired, it was presently, broadcasting without a license and would be taken off the air by ICASA.
- [2] Vaaldriehoek has filed its complaint by way of an affidavit.
- [3] Since it is the Chairperson of the Complaints and Compliance Committee's task in terms of section 17(6) of the ICASA Act to convene a meeting of the Complaints and Compliance Committee, the Coordinator referred this matter to the undersigned. The practice is that the Chair refers a complaint to the CCC, after consultation with the Coordinator. This is done when the CCC has jurisdiction and a *prima facie* case has been made out. Furthermore, as Malan J (as he then was) pointed out in *SA Jewish Board of Deputies v Sutherland NO*<sup>2</sup> fairness and the gravity of the issue might require that a hearing takes place, even where a *prima facie* case has not been made out.
- [4] A question which must first be addressed is whether the CCC does have jurisdiction to hear a matter which has to be answered by a Division of ICASA, which is mandated by Council to administer the issuing of community licenses. This case differs, of course, from instances where a Division refers a matter to the CCC for adjudication.
- [5] The jurisdiction of the CCC is determined in two sections of the ICASA Act:  
17B. Functions of Complaints and Compliance Committee  
The Complaints and Compliance Committee –
  - (a) must investigate, and hear if appropriate, and make a finding on -
    - (i) all matters referred to it by the Authority;
    - (ii) complaints received by it; and
    - (iii) allegations of non-compliance with this Act or the underlying statutes received by it; and

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<sup>2</sup> SA Jewish Board of Deputies v Sutherland NO & Others 2004(4) SA 368(W).

- (b) may make any recommendation to the Authority necessary or incidental to -
  - (i) the performance of the functions of the Authority in terms of this Act or the underlying statutes; or
  - (ii) achieving the objects of this Act and the underlying statutes.

#### 17C. Procedure of Complaints and Compliance Committee

- (1) (a) A person who has reason to believe that a licensee or another person is guilty of any non-compliance with-
  - (i) the terms and conditions of a license;
  - (ii) this Act; or
  - (iii) the underlying statutes,
 may lodge a complaint with the Authority within 60 days of becoming aware of the alleged non-compliance.

- (b) The Authority may-
  - (i) where the complaint concerns a licensee, direct the complaint within 30 days of receipt of the complaint, to the Complaints and Compliance Committee for consideration;
  - (ii)...;or
  - (iii) investigate the complaint as contemplated in section 4(3)(n).

[6] It is informative that section 17B grants jurisdiction to the CCC to investigate, and hear if appropriate, and make a finding on “complaints received by it.” The absence of the word “licensee” as in section 17C is notable and cannot be ignored. Whilst this may indeed include the issuing of an order against a licensee, the present matter can obviously not go in the direction of orders against ICASA or a division of ICASA. It is intended to be *advisory* as to procedure and the addressing of the position of the licensee in a fitting manner which would also not be to the detriment of the listening community, whose rights are protected by section 16 of the Constitution of the RSA.

[7] In any case, ICASA would, with respect, only be in a position to close down a broadcaster if advised to do so by the CCC or if it approaches a Court. It would, in my respectful opinion, amount to “taking the law into one’s hands,” to close

the station down without an advice by the CCC or a Court order. There are in fact three recent judgments by the Constitutional Court which accentuate that the law may not be taken into one's hands. Of course the Court recognizes that certain administrative actions may be taken without intervention of a Court. But, in my view, taking a broadcaster off air, would most definitely not qualify.

[8] Thus: the Coordinator to request a Response by way of affidavit to the complaint from the Division involved as well as a Reply from the radio station involved. Since the matter is urgent short time periods should be set.

## **JUDGMENT**

JCW VAN ROOYEN

[1] I issued a preliminary ruling as to whether the Complaints and Compliance Committee has jurisdiction to hear this matter. The preliminary Ruling is most relevant to the matter before the CCC since it establishes its jurisdiction to hear the matter. The CCC, at the hearing of this matter, was in agreement with the Ruling. A copy of the first two pages of the licence as issued is attached in a Supplement.

## **THE MERITS OF THE MATTER**

[2] A dispute has arisen between Vaal Community Radio ("VCR") and the Licensing Division at ICASA. The dispute pertains to the lapsing of a Class Broadcasting Service License granted to VCR by ICASA on 2 September 2014. VCR commenced broadcasting in 1995 and currently has approximately 240 000 listeners. VCR broadcasts to various areas including Vereeniging, Vanderbijlpark, Sasolburg, Meyerton, Southern parts of Alberton, Deneysville and the surrounding areas.

[3] ICASA granted VCR a Class Broadcasting Service License on 27 October 2008 for a period of five years which licence was subsequently renewed and issued on 2 September 2014.

[4] The Licensing Division at ICASA stated at the hearing that a Schedule was attached to the 2014 licence in terms of which the licence was valid from 27 October 2013 to 26 October 2018. VCR stated that it had received the

licence with only the first page attached. The further pages of the document were not attached. On the second page, under the heading of the Schedule, the licence was stated to expire on 26 October 2018. It had been backdated to when the licence expired. The Station Manager addressed correspondence to ICASA on 25 September 2014 expressing his appreciation to ICASA for the renewal of the Class Broadcasting Service License for another 5 years.

- [5] VCR accepted that the licence was issued for a five-year period and that it would expire on 1 September 2019. When VCR applied for a renewal based upon its assumption that the expiry date was 1 September 2019, the Licensing Division informed VCR that the licence had expired on 26 October 2018 as set out in the Schedule attached to the licence. VCR continued broadcasting while the matter was being considered by ICASA and the CCC. The backdating was based on the fact that the previous licence had expired earlier and that, in issuing the licence in the next year, that was taken into consideration. This resulted from a special dispensation by ICASA for licensees that had not applied timeously for renewal.

## **FINDING**

- [6] We will first deal with the effect of page one of the licence, which contains the date of issue and was signed by an official of ICASA. Although the schedule formed part of the bundle, the Licensing Division did not, at the hearing of this matter, provide additional supporting evidence that the Schedule referred to was indeed attached to the first page of the licence, which had been sent to VCR. On the other hand, the Station Manager confirmed at the hearing that he had only received the first page of the licence and that no Schedule was attached to the page he received. As will appear hereunder, the licence term is five years from the *date of issue* in terms of the 2010 Regulations. The date of issue is the date which appears on the first signed page of the licence and it was, accordingly, reasonable of the Station Manager to have accepted that the five year term commenced on the date of issue as reflected on the signed first page. No reference is made to any accompanying Schedule on the page that the Station Manager received. The evidence was, furthermore, clear that VCR

had at least shortly before or during the grace period granted by ICASA filed its application for renewal. Ultimately VCR had no reason to believe that page two would contain a shorter term when it received the first page of the licence in 2014.

- [7] The relevant 2010 Standard Terms and Conditions Regulations provide that the term is *five years* from the date of issue of the licence and page one indicated the date as 2 September 2014. It is true that the said licence further contained a schedule which has a specimen of a licence. The specimen of a licence makes provision for the Authority to stipulate a commencement date, which was argued could differ from the first page. The date of issue was, however, the date upon which the licence was signed by an official from ICASA on page one thereof. And that is the official date on which the 5 year term of a licence commences, according to the 2010 Regulations.

#### **Advice to Council**

**(1) Council is, with respect, advised in terms of section 17B of the ICASA Act to regard the licence as having only expired in 2019 and direct that the licence be renewed within a reasonable time after the issue of this judgment.**

**(2) The Standard Terms and Conditions for Class Broadcasting Services Regulations (effective from 11/9/2011) provide that the date of issue of a licence is the effective date from which the five years run. And that date is indicated as 2 September 2014. This date may not be amended in the Schedule, even if the Schedule contains a space where the term may be written in by the Authority.**

**(3) Backdating is, in any case, according to section 33(l) of the Constitution of the Republic of South Africa not permitted. It provides as follows:**

*Every accused person has a right to a fair trial, which includes the right...*

*l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.*

**Backdating a license would mean that duties will be placed on the licensee from an earlier date than the date of issue, which duties may lead to contraventions being found by the CCC for that backdated period**

in conflict with the said section 33(l) of the Constitution. A back-dated contravention may lead to a fine being advised by the CCC to Council and, if not paid, could lead to a prosecution before a Criminal Court in terms of section 17H of the ICASA Act. That would be in conflict with the Constitution and null and void.

Thus: the 2010 Regulations provide that the date of issue of the licence is the effective date and the five years run from that date. A Broadcasting license may not be backdated and the *five year term* is calculated from the date of issue— thus the date that appears on the first signed page. The five year term of the licence will therefore have expired at midnight 1 September 2019.

Given the date on which this judgment will be published – in 2020 – the new date of issue will, as advised, be in 2020 and the term will, according to the 2010 Regulations, be five years running from that 2020 date.



JCW van Rooyen SC

12 February 2020

**The Members agreed**

**SEE THE SUPPLEMENT TO THE JUDGMENT**

**SUPPLEMENT**

[Copy of first two pages of license The first signed page indicates the date of issue and thus the commencement of the licence as per the 2010 Regulations]

**CLASS BROADCASTING SERVICE LICENSE**

No. Class/Re/com/R81/Sept/2014

GRANTED TO

**VAAL COMMUNITY RADIO**

**FOR THE PROVISION OF  
COMMUNITY SOUND BROADCASTING SERVICE TO BE KNOWN AS**

**VAAL COMMUNITY RADIO**

**SIGNED FOR AND ON BEHALF OF THE INDEPENDENT COMMUNICATIONS  
AUTHORITY OF SOUTH AFRICA**

AT SANDTON ON THIS 2<sup>ND</sup> DAY OF SEPTEMBER 2014.

(Signed)

NKHETHELENI GIDI

ACTING GM: LICENSING

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**(Second page which was not attached as found by the CCC in the main  
judgment)**

SCHEDULE



**1. LICENSEE**

The License is issued to:

- 1.1 Name of entity: Vaal Community Radio
- 1.2 Name of the Station: Vaal Community Radio
- 1.3 Control of the Licensee: Control shall vest in the Board of Directors of a non-profit company known as Vaal Community Radio.

**2. LICENSE PERIOD**

- 2.1 The effective date of the License is 27 October 2013.
- 2.2 The License shall expire on 26 October 2018.

**3. LICENSE AREA**

The Licensee shall provide services to Vereeniging, Vanderbijlpark and Sasolburg in the Gauteng Province as set out in the Licensee's radio frequency spectrum license.

**4. ...****5. COMMUNITY**

- 5.1 The Licensee shall provide services to a geographic community residing within the geographic coverage area specified herein.
- 5.2 The Licensee shall provide for the participation of community members in the affairs of the station in the following ways:

