

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 8 June 2018

Case Number: 277/2018

ANTHONY DUKE AND OTHERS

COMPLAINANTS

v

BREAKTHROUGH ADVENTURES NPC

RESPONDENT

PANEL: Prof Kobus van Rooyen SC (Chairperson)
Dr Keabetswe Modimoeng (ICASA Councillor)
Mr Peter Hlapolosa
Mr Mzimkulu Malunga
Mr Jacob Medupe
Prof Kasturi Moodaliyar
Mr Jack Tlokana

Mr Anthony Duke, assisted by Co-Complainants Ms Janet Marshall and Mr Pieter van Aswegen, put the case of the Six Complainants.

Mr John Mathew on behalf of the Licensee, as Director.

Acting Coordinator for purposes of the hearing: Ms. Meera Lalla (Attorney)

Coordinator of the CCC: Ms. Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

[1] Breakthrough Adventures NPC, a non-profit company, is the licensee of a community radio station, Whale Coast FM. It also has a frequency spectrum licence.

¹ An Independent Administrative Tribunal at the Independent Communications Authority (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. The Tribunal, inter alia, decides on complaints from outside ICASA or references from within ICASA which it receives against licensees in terms of the Electronic Communications Act 2005, the Broadcasting Act 1999 or the Postal Services Act 1998 (where registered postal services are included). Where a complaint is upheld, the matter is referred to the Council of ICASA with a recommendation as to an order, if any, against the licensee. Council then considers an order 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. Also where a complaint is not upheld, the matter is referred to Council.

The geographic coverage area is: Overstrand and Theewaterskloof Local Municipalities in the Overberg District Municipality. The station is situated in Hermanus, which lies along Walker Bay on the south coast of the Western Cape Province of the Republic of South Africa. It is located about 115 km southeast from Cape Town. According to Mr. Mathew who, as Executive Director, appeared on behalf of the licensee (accompanied by Mr. Mhlangabezi Sithonga, also a Director) the area reached by the broadcaster is more or less 2000 square kilometres. The latest population number is, combined, in the vicinity of 201000. Other directors are Ms. Batandhile Siwendele and Mr. Rodney Nissan.

[2]The Class Broadcasting Service License, as re-issued to the licensee in 2017, repeats the conditions of the first license. After stating that the renewed license was effective from 3 July 2014, the date of re-issue is indicated as 11 September 2017.

The Schedule to the license reads as follows:

1. Licensee

The Licence is issued to:

1.1.Name of Company/Entity: Breakthrough Adventures NPC.

1.2.Name of the Station: Whale Coast FM.

1.3.Control of the Licensee: Control shall vest in the governing body of Breakthrough Adventures NPC.

2. Licence Period

2.1. The effective date of the licence: 03July2014.

2.2. The licence shall expire on: 02July2019.

3. Geographic Coverage Area

The Licensee shall provide services to Overstrand and Theewaterskloof Local Municipalities in the Overberg District Municipality, as set out in the licensees' radio frequency spectrum licence.

4. Community

4.1. The Licensee shall provide services to a geographic community residing within the geographic coverage area specified herein.

4.2. The Licensee shall provide for the participation of community members in the affairs of the station in the following ways:

4.2.1 The Licensee shall hold at least two (2) meetings annually with its community focusing on programming and programming policies of the station.

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

4.2.3 The Licensee shall hold Annual General Meetings (AGM) for the following purposes:

4.2.3.1 To provide feedback on the Licensee's compliance with licence conditions,

4.2.3.2 To provide feedback on the Licensee's operational and Financial performance, and any Special Annual General Meeting as and when required by the constitution; and

4.2.3.3 To elect members of the controlling structure e.g. Board of Directors, Trustees etc. Subject to the licensee's founding documents.

.....

8.1 The Licensee shall provide for the participation of community members in the affairs of the station in the following ways:

8.1.1 Special phone-in programmes by members of the community.

8.1.2 School services to be accommodated in terms of programming and their inputs.

8.1.3 Spiritual support and programmes aimed at the elderly and senior members of the community including youth.

8.1.4 Participation in the development and education of the Afrikaans Christian culture.

COMPLAINT ²

[3] The following complaint was lodged with the CCC Coordinator on 18 April 2018 by Mr. Anthony Duke plus five other members of the community. The Complaint (shortened) reads as follows:

Background

I wrote to ICASA about my concern at the regulatory compliance of Whale Coast FM (WCFM) in September 2017 temporarily involved with the station after being asked for help by a group of concerned station staff and citizens....

² Parts left out are indicated with ...

On June 20th, 2017, an AGM was held to elect new board members. Without incident, the board was duly elected and proceeded to hold a board meeting on 26th June to determine its constituted mandate and elect a chairman, secretary and treasurer. This board of five had four new members and one from the previous board, the treasurer. What followed was a determined and successful campaign to shut a newly elected board down after it attempted to obtain documents pertaining to the station's administration and regulatory affairs. From the outset, the station manager was non-cooperative with the board due to what was described by the Licensee as *"It only has a ceremonial role and should only meet once or twice a year and the board plays no role in oversight of the station management or any of its operations"*. None of this was conveyed when the AGM was held.

Upon being elected, the new board discovered that:

- The Breakthrough Adventures director's list was out of date at the CIPC.
- No membership list existed.
- Another company seemed to exist that made all decisions, not the elected board.
- The Licensee was paid amounts of R2,171.40; R361.90; and R330.00 in May and June 2017 for services that management refused to explain. This is despite the fact that the Licensee had not performed any role at the station for over two years.
- The Articles of Association published on the station's website and used by the board was abruptly removed.
- Non-existent station policies are used to intimidate, victimise and punish

staff.

- No access to the station's ICASA licence.
- Confusion over the actual frequencies granted to the station by ICASA.
- A treasurer who stated: *"There are apparently procedures whereby the matter (the AGM) should be referred to ICASA, but I think this will seriously harm the status of WCFM and its broadcasting licence. I do not want to see the station or company fall foul of the law [or ICASA]!"*

Although there were no queries about the legality of the board for a month, the treasurer declared that the newly elected board was illegal and dismissed it. This came about after the board asked for, amongst other documents:

- A complete and up to date financial report
- The company's bank statement
- The station's asset register
- Transmission records
- ICASA documents
- All contracts (including Service Level Agreements)
- Station job descriptions
- Sales

Furthermore, I found what I considered to be consistent transgressions of the PFMA.

In the period that I had monitored WCFM, the first observation was that no coloured folk were on air, despite the massive demographic share. Mixed race in Hermanus outweighs the White population at 30.2% to 29.1%

- I observed more (and longer) transmitter breaks than I have ever experienced in my career....

- More gaps between music, commercials and promos, than a normal station.
- More dead air than any normal station.
- Sound levels that are unpredictable.
- Inconsistency in the playlist.
- Poor presentation skills.
- An obvious lack of training, both basic and specific.
- Poor news reading skills.
- Local news not prioritised.
- Automation at critical day-parts.
- Not enough community involvement or activities initiated by the station.
- Few, if any, local correspondents.
- A station with a website last updated in 2016.
- An App that is advertised on air as 'information on station activities' but has no content at all.
- Few local businesses: cafe, shop, mall, retail store that has WCFM playing on their premises.

The complaint is that Mr. John Matthew, the licensee, seems to consider himself as the "owner" and "sole shareholder" of Whale Coast FM. He has flouted licence conditions and does not deem it important that the Community that "his" radio station serves, is not deserving of any meaningful say in how the station performs. Furthermore, he does not adhere to legislation governing community radio and Non-Profit Companies. The community of Hermanus and the Overberg deserve a better service than what is being offered by Whale Coast

FM, but there is open resistance to improving the station's fortunes. What's more, vested interests control operations without the necessary mandate. Hermanus could, and should have a station to be proud of. It doesn't. Whilst I write on behalf of this concerned group of six, there are many citizens in the town who are as equally disappointed and dissatisfied. There is an abundance of retired and experienced talent in Hermanus. But despite generous offerings to work free of charge, the station has steadfastly refused any help from, amongst others: market specialists; a commercial production engineer; transmission experts; a SABC programme producer; a former Manager of SABC Radio Training; and two station managers with 25 years of experience at SABC Radio. Retired professionals who offer to help are ignored and efforts to improve the station are rejected by the Licensee...

Relief Sought

The Complainants request that ICASA does a financial audit of the books of Breakthrough Adventures; Registration: 2006/020308/08 (Companies Act 1973) and Whale Coast FM in terms of section 5 of the ICASA Act, Chapter VI, Community Broadcast Services. And that the Licensee, Mr. John Matthew, be ordered to hold an Annual General Meeting with a legitimate date and under the auspices, control and facilitation of ICASA.

WHALECOAST FM's RESPONSE³

[4] The Respondent Answered the Complaint as follows:

1. Preamble

1.1. We thank the Authority for the opportunity to formally respond to the complainant.

³ Parts omitted are indicated with ...

2. Complainant's Credentials

- 2.1. We note the complainant's eagerness to portray himself and his co-signatories as being current or past Directors of the Licensee, Breakthrough Adventures NPC.
- 2.2. With the exception of Janet Marshall, neither the complainant nor any of the co-signatories have ever served as Directors of Breakthrough Adventures NPC.
- 2.3. With the exception of Pieter van Aswegen and Janet Marshall, whose memberships have now lapsed, we have no record of any of the complainants being accredited members of Breakthrough Adventures NPC at any time.

...

3. The AGM

- 3.1. An AGM was held on June 20, 2017.
- 3.2. At said meeting, the complainant and his co-signatories misrepresented themselves as members, in good standing, of the Licensee.
- 3.3. Unfortunately, without the proper legal oversight, the meeting erroneously accepted their membership and voted them in as board members.
- 3.4. This was an error on two levels, namely:
 - 3.4.1. Only members, in good standing as per the Licensee's constitution, are eligible to serve as Directors,
 - 3.4.2. Directors are forbidden from occupying dual roles in the organisation. ...

3.4.3. As can be seen on the first page of the complainant's affidavit, all of the co-signatories, except one, were on-air presenters on Whale Coast FM at the time of the AGM.

3.5. These two factors made the election of the Directors at the AGM null and void.

4. The intervention

4.1 The then Station Manager, Dayne Nel, called Mr. Mathew, the Founder and Executive Director of the Licensee who had been on special leave to ask him to intervene urgently.

4.2 Mr. Mathew then investigated the matter and discovered that the Complainant and his co-signatories were not eligible for the positions.

....

4.3 Mr. Mathew then called an emergency Board meeting with the Directors of record namely himself, Mhlangabezi Sithonga and Janet Marshall.

4.4 At first, Janet Marshall responded by denying that she was a Director. However, once proof was provided, she responded by saying that she would only attend the meeting if she were accompanied by a personal adviser.

4.5 When Mr. Mathew indicated that there was no provision in the License constitution for Directors to include personal advisors in board meeting, Ms. Marshall immediately tendered her resignation.

5. The General Meeting of August 3, 2017

5.1. A general meeting was called on August 3, 2017 to communicate to all

the situation that the organisation faced.

5.2. The Station Manager invited a professional facilitator, Dr. James Gray, to facilitate the meeting.

5.3. After some discussion, the complainant resigned from the organisation.

5.4. Not having been a member of the organisation, the complainant's resignation was moot, but we accepted same in the interests of moving the organisation forward.

6. The General Meeting of October 10, 2017

6.1. This general meeting resolved to:

6.1.1. set up a steering committee for the Radio Station which included complainant's co-signatories.

6.1.2. mandate John Mathew to propose a Director to replace Janet Marshall on the Board and to continue to expand the membership and board in accordance with the Licensee's constitution.

7. The Licensee's Credentials

7.1 The Licensee is a registered non-profit Company with the registration number 2006/020308/08.

7.2 The Licensee's Articles of Incorporation and Financials are lodged with:

7.2.1 ICASA

7.2.2 CIPC

7.2.3 Adams-Auditors

and available on request.

7.3 Further, the Licensee is registered and in good standing with:

7.3.1. SARS

7.3.2 UIF

7.3.3 SAMRO

7.3.4 NCRD (Western Cape)

7.3.5 MDDA

7.4 Additionally, the Licensee is a strategic partner with:

7.4.1 GCIS

7.4.2 Western Cape Government

7.4.3 Overstrand Municipality

7.4.4 The South African National Space Agency (SANSA)

7.5 ...

8. John Mathew's Credentials

8.1. John Mathew is the Founder and Executive Director of the Licensee.

8.2. He is an employee of the Licensee and acts as an ex-officio Director on the board.

8.3. His experience includes Education (he is a qualified teacher), Media (he owned and ran a Media Production Company for many years) and Community Development (he holds a Master's Degree in Applied Theology).

....

8.6. John Mathew took a period of special leave in order to fulfil a contractual obligation.

8.7. Although not physically present for much of this period, he continued to oversee the licensee using video conferencing technology.⁴

8.8. We would like to place on record that John Mathew remains in his position of Executive Director and has never vacated that position.

9. Finances

⁴ Mr Mathew explained in his evidence before the CCC that the amounts paid to him related to his costs in keeping email and other contact with the station management during his absence.

- 9.1 The Licensee's account is audited yearly. This despite not being obliged to so or required by law to do so.
 - 9.2 This decision was taken to ensure that there would never be any hint of an improper connection with the Licensee's financial affairs.
 - 9.3 The Licensee's Registered Auditor is Don Adams. ...
 - 9.4 Audited financial statements are available on request.
 - 9.5 The complainant makes reference to payments made to John Mathew (whom is again incorrectly identified as the Licensee).
 - 9.6 As the Executive Director acting on behalf of the Company, John Mathew is well within his right to receive compensation for out of pocket expenses.
10. Membership
- 10.1 Due to the on-going interference in the administration of the Licensee by some of the co-signatories, a proper membership list of approved members in good standing according to the Licensee's constitution, was not maintained.
 - 10.2 ...
 - 10.3 Given this... violation of the Licensee's Constitution, the Board is giving this matter serious consideration, to ensure that we are compliant with both the Authority's regulations and the Licensee's constitution.
 - 10.4 We have already started the work of attracting and registering suitable new members.

11. The Directors

At present, the Directors of the Licensee are:

Mhlangabezi Sithonga (Small Business owner and Lay Preacher) Bathandile Siwendele (Social Worker at the Hermanus Rainbow Trust). Rodney Nissan (Project Manager for Enlighten Education Trust) John Mathew (Executive Director of Breakthrough Adventures NPC and Chairperson of the Hermanus Rainbow Trust). This Board of Directors is representative of the entire Overstrand community in terms of race, gender, language, age, religion and culture.

12. Programme Schedule

Whale Coast FM's programmes schedule more than satisfies its Promise of Performance... In terms of phone-in programmes, the complainant is obviously unaware of our flagship Gospel programme on Sunday nights. This is an intensely interactive show with the telephone ringing off the hook for most of the programme.

The "Other Company". The complainant makes reference to *another company that makes all the decisions*. This is understandable, given the complainant's ignorance about who the Licensee is. The "other company" that the complainant refers to, is of course, the Licensee, Breakthrough Adventures NPC. We emphasise once again that John Mathew is NOT the Licensee.

The "Mixed Race". The complainant makes reference to a "mixed race" community. By "mixed race," we can only surmise that the community the complainant is referring to, is the community he later identifies as "coloured folk." We would like to put on record that we reject with contempt both of these racist and patronising characterisations of the Coloured community.... It is true that the Coloured community is not represented on air sufficiently. However, this is not for a lack of effort on our part. We are finding it incredibly difficult to attract the Coloured Community in the face of two commercial stations broadcasting in our area, namely, Heart FM and Good Hope FM. These stations target this demographic aggressively, making it difficult for us to compete. However, we air a weekly packaged programme called "Die Wasgoedlyn" in which local Coloured artists are featured prominently. In terms of staff and Directors, both our long-standing Administrator, Agnes Steyn, and one of our Directors, Rodney Nissan are members of the Coloured Community.

13. Retirees

We have always welcomed the contribution of retirees. In fact, our first Chairperson, Leonard Smith, was a retiree, and for the record, a Coloured gentleman. Others who have contributed and still contribute to our success, include:

Dr. Nelia Louw – Educationalist and Presenter;

Dr. Martin Fisher – Social Psychologist and Presenter

Dr. Robin Lee – Chair of the University of the 3rd Age-Contributor

Petrovna Meterlakamp – Author and Presenter

Dr. Toekie Oberholzer – Psychologist and Presenter

Mr. David Hagan – Broadcast Specialist

Mr. Koos Verhoef – Transmission Engineer

Mr. Tony O'Hagan – Sports Presenter

Ms. Anne Krebs - Presenter

Disappointingly, one retiree whom we accepted as a trainee in 2018 and spent many hours training as a presenter, ended up being one of the co-signatories of the complainant's affidavit.

.....

16. Dissatisfied Citizens

16.1. We note that the complainant mentions that there are many citizens who are disappointed and dissatisfied with our service.

16.2. We are not aware of these citizens other than the small group headed up by the complainant.

16.3. We have a Whatsapp line, a Phone line, a Facebook Group with over 3,000 members and a Website through which our listeners interact with us.

16.4. Overwhelmingly, the feedback we get from residents is positive, and where we do receive constructive criticism, we respond quickly. ...

.....

17.2.1.3.4. Its membership of the NGO Association, *Whale Coast Connect*.

17.2.1.3.5. Its Phone-In programmes.

- 17.2.1.3.6. Its strategic partnership with GCIS.
- 17.2.1.3.7. Its strategic partnership with the University of the Third Age (Overberg)
- 17.3. The Licensee shall hold Annual General Meetings (AGM) for the following purposes:
 - 17.3.1. To provide feedback on the Licensee's compliance with licence conditions:
 - 17.3.1.1. Attached please find attendance registers of AGMs.
 - 17.3.2. To provide feedback on the Licensee's operational and financial performance, and any Special Annual General Meeting as and when required by the constitution; and
 - 17.3.2.1. Attached please find the latest financial statement.
 - 17.3.3. To elect members of the controlling structure e.g. Board of Directors, Trustees etc. Subject to the licensee's founding documents.
 - 17.3.3.1. Attached please find the Resolution appointing new Directors according to the Licensee's founding documents.
- 17.4. Clause 8.1. "The Licensee shall provide for the participation of community members in the affairs of the station in the following ways:
 - 17.4.1. Special phone-in programmes by members of the community".
 - 17.4.1.1. Attached, please find the following "phone-in" excerpts:
 - 17.4.1.1.1. A discussion on "School Subject Choices" from an educationalist.
 - 17.4.1.1.2. Four calls taken from a recent Gospel programme.
 - 17.4.1.1.3. Two calls taken in respect of the recent protest actions in the Overstrand.
 - 17.4.1.1.4. Two calls taken during the recent "*Mayoral*

Sports Day" in which you will hear Mr. Tony O' Hagan and the Deputy Mayor of the Overstrand, Cllr Elnora Gillian.

17.4.1.1.5. An update on the offerings of the U3A in the Overstrand.

17.4.1.2. These excerpts represent a small mattering of the calls received by Whale Coast FM. Further audio can be supplied if required by the authority.

18. **The Conclusion**

18.1. The complainant's... plan to... lure a small group of presenters into his camp and then attempt to ambush an AGM, has rightly come to nought.

18.2. - 18.5...

18.6. The complainant makes much of the importance of on-air presentation and other technical considerations, but seems... unaware of the vital role Community Radio needs to play in the social revolution taking place in South Africa.

18.7. And no more so than the region that we find ourselves in.

18.8. The Overstrand is currently one of the flash-points of civil protest in South Africa. This is largely due to the close proximity of those living in opulence and privilege on the one hand, and those in grinding poverty on the other.

18.9. The present Board of Directors have been strategically identified and voted into office for their vigorous social justice service and diversity.

18.9.1. Ms. Bathandile Siwendele, a social worker and Zimbabwean National is strategically placed to not only represent the social challenges in our communities, but also the challenges facing our foreigners who are often in fear of their lives as a result of xenophobia.

18.9.2. Mr. Rodney Nissen has a long history in Education Management and is perfectly positioned to help the

Board understand the educational challenges that we face, particularly in the light of the emergence of private schooling in the region.

18.9.3. Mr. Mhlangabezi Sithonga, a lay preacher and small business owner acts as an invaluable link to the faith communities in our townships and informal settlements. Additionally, he provides the board with insight into the difficulties small businesses face in accessing finance, premises and advertising know-how.

18.9.4. Mr. John Mathew is the Executive Director and brings with him a long history in Education, Media and Community Development.

18.10. Taken together, the Directors represent every community resident in the Overstrand.

18.11 -.13.....

18.14 Whale Coast FM finds itself in a very healthy place at the moment.

We have a full roster of enthusiastic presenters, we enjoy the support of the broad community we serve, are receiving requests for advertising space on a regular basis and we are in full compliance with our suppliers, strategic partners and all applicable regulating Authorities.

18.15. Moreover, the Licensee, Breakthrough Adventures NPC, will celebrate its Twelfth Anniversary this year. Twelve years of impeccable social justice activism through the building of an inclusive organisation that stands for the values enshrined in South Africa's Bill of Rights and playing a vital role in the social revolution needed in our country and region at this time.

CONSIDERATION OF THE COMPLAINTS

[5] The following relief was sought by the Complainants:

The Complainants request that ICASA does a financial audit of the books of Breakthrough Adventures (Registration 2006/020308/08 Companies Act 1973) and Whale Coast FM in terms of section 5 of the ICASA Act, Chapter VI, Community Broadcast Services.

And that the licensee, Mr John Mathew, be ordered to hold an Annual General Meeting with a legitimate mandate and under the auspices, control and facilitation of ICASA.

[6] The issue before the CCC is whether the relief sought by the Complainants is based on:

- (a) an omission of the licensee to abide by its ICASA licence conditions; or
- (b) a contravention of the 2011 Standard Regulations for Class Broadcasters, read with the Electronic Communications Act 2005.

[7] The licensee is a company, Breakthrough Adventures NPC, and controls several community orientated ventures. One of which is Whale Coast FM.

The following terms of the *licence* are relevant insofar as this judgment is concerned:

1.3 Control of the Licensee: Control shall vest in the governing body of Breakthrough Adventures NPC.

Breakthrough Adventures is a company and its Board of Directors is responsible for the control of the radio station. The profits, if any, of the station are not distributed amongst members but ploughed back into the Company, which also serves the community in other respects. Its directors are elected in terms of its Articles of Association.

4.2.3 The licensee shall hold Annual General Meetings for the following purposes:

- 1. To provide feedback on the licensee's compliance with licence conditions;*
- 2. To provide feedback on the licensee's operational and financial performance, and any Special Annual General Meeting as and when required by the constitution; and*
- 3. To elect members of the controlling structure e.g. Board of Directors, Trustees etc subject to the licensee's founding documents.*

[8] An Annual General Meeting for Breakthrough Adventures NPC would, in law, not mean that a meeting aimed solely at broadcasting must be held. All the ventures of the Company would be on the agenda. The AGM would be that of the Company and only persons who may vote in terms of the Articles of Association of Breakthrough Adventures may take part in the Annual General Meeting. The Agenda would include points one and two above and, if relevant, also the election of the Board of Directors or the filling of a vacancy on the Board. We were informed at the hearing of this matter that the representation on the Board has been widened. Mr. Mathew, on behalf of the licensee, has provided satisfactory evidence that an AGM of the licensee has been held annually and that the matters noted were reported on. As soon as the financial statements have been approved by the Auditors of Breakthrough Adventures, the 2018 Annual Meeting will be held. The audited Financial Statements will also, as in the past, be provided to ICASA. The CCC was also told that the licensee plans to widen its membership. This was, at the stage of the hearing of this matter, already done by adding two directors from sections of the community previously disadvantaged by unfair discrimination.⁵

[9] The **broadcasting licence also contains the following relevant clause:**

- 8.1 *The licensee shall provide for the participation of community members in the affairs of the station in the following ways:*
- 8.1.1 *Special phone in programmes by members of the community.*
 - 8.1.2 *School services to be accommodated in terms of programming and their inputs.*
 - 8.1.3 *Spiritual support and programmes aimed at the elderly and senior members of the community including youth.*
 - 8.1.4 *Participation in the development and education of the Afrikaans Christian culture.*

⁵ See section 9 of the Constitution of the RSA.

[10] The Regulations Concerning Standard terms and Conditions for Class Broadcasting Services 2010, as amended on 30 March 2016, provide, inter alia, as follows:

10A. General obligations of licensees

- (7) Ownership and Control of Community Television and Community Radio:
 - (a) A Licensee must be owned by community members with the Board of Directors as custodian of the licence.
 - (b) A Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.
 - (c) A Licensee must be managed by person(s) tasked by the Board of Directors to ensure the licensee's daily operation. However, this excludes a private company since a community television or class sound community radio is non-profit.
 - (d) The Board of Directors/ Trustees and station management must not occupy dual roles with regard to being managers/presenters at the radio station.
- (8) The programming of community television or community radio must meet the needs of community members within its broadcasting coverage area by encouraging the following:
 - (a) The participation of community within its coverage area in the production of content; and
 - (b) The majority of content produced must be from the coverage area. This is to ensure that involvement of content producer(s) outside the coverage area is limited as to enable the reflection and participation of local producers.
 - (c) A Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.

[11] The CCC has come to the conclusion that the essence of a community radio is absent in Whale Coast FM. Whatever the structure involved (a company), the

question is whether this station is truly managed as a community radio station, as required by the Electronic Communications Act, its licence and the 2010 Regulations, as amended. The station must be “owned” by the community and the Board of Directors is the custodian of the licence. In the present case it is the Board of Breakthrough Communications.

[12]In essence the running of the station does not comply with the fundamental requirement of a community broadcaster. And that is, the “ownership” by the relevant community and the custodianship by the Board of Breakthrough Communications. We have been informed at the hearing of the matter that two members of the community have been added to the directors and that their appointment is supported by section 9(2) of the Constitution of the Republic of South Africa. However: there is no evidence that *meetings* were held with the community (or communities) involved. It is true that the station reaches an area of more than 2000 square kilometres and that direct contact may be problematic. But that is no excuse for not, at least, having two meetings per year with its community or communities, as required by law in this regard.

Our finding is, that there is no evidence that Breakthrough Communications has, as required by law, had meetings with the community that it serves and encouraged the community within its coverage area to participate in “ownership”. And this amounts to a contravention of Regulation 10(a)(7)(a) quoted in footnote 5. The licensee is also in contravention of section 10(a)7(b) in that it has not encouraged the community within its coverage area to participate in ownership and management of the radio station.⁶

[13]Finally, to get back to the Complaints before the CCC, as stated before.

⁶10A. General obligations of licensees

- (7) Ownership and Control of Community Television and Community Radio:
 - (a) a Licensee must be owned by community members with the Board of Directors as custodian of the licence.
 - (b) a Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.

(a) There is no basis in law for the CCC to advise the Council of ICASA, on the evidence before the CCC, that the licensee's financial affairs must be inquired into. The licensee has annually filed its financial statements as *audited*. More than that cannot be required in law, unless there is clear evidence of fraud. There was no such evidence before the CCC.

(b) There is also no reason to order an Annual General Meeting of the licence holder—the General Meeting of the Company is to be held in 2018 as soon as the audited financial statements are received.

(c) The question is, however, whether the licensee has ensured that it has complied with its duties as a community broadcaster.

The Electronic Communications Act 2005 defines a “community broadcaster” as follows:

“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;

There is no evidence before the CCC that Breakthrough Adventures has not complied with the (a)-(c) requirements. It has employed several members of the community as presenters and has contact per Facebook with more or less 3000 listeners

(d) Section 50 of the ECA lays down the criteria for the granting of a community broadcasting service. It provides as follows:

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.

There is no evidence before the CCC that Breakthrough is not in compliance with the above criteria.

(f)The licence conditions of Breakthrough Adventures provide as follows:

Clause 4.2. "The Licensee shall provide for the participation of community members in the affairs of the station in the following ways:

- (a) The Licensee shall hold at least two meetings annually with its community on programming and programme-related matters for the selection and provision of programmes;
- (b) The Annual General Meetings (AGM) must be held 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 or Trustees

(c) The Licensee shall provide for the participation of community members in the affairs of the station e.g. by special phone-in programmes by members of the community".

The AGM of Breakthrough Adventures was held as a company. The licence condition was, accordingly, complied with. There was also compliance with licence condition (c).

There was, however, no evidence of holding meetings with the community involved. Thus:

[1] No annual general meetings were held with the community and the licensee has failed to furnish the Authority with proof of such meetings as well as the attendance thereof by members of the community. Meetings with the community are a priority and the absence thereof in the present case amounts to a contravention of the licence conditions of Breakthrough Communications.

[2] The main stakeholder of a community radio station is the community it serves. Nothing has been done by the licensee to comply with this requirement of a community radio broadcaster: a corporate social responsibility to ensure that it has societal support to manage its role within this community and contribute to sustainable development through its main stakeholder, the community it aims to serve. It can only achieve this by having an additional structure accepted by the community. Breakthrough Adventures has not taken the matter forward as required by the relevant legislation and the licence conditions for community radio stations. Thus: There is no Constitution for the radio station's relationship with the community it serves. **The omission amounts to a contravention of Regulation 10A(7) and (8) quoted above in footnote 6. Although some**

efforts have been made to draw on the expertise of the community, this does not accord with what is expected from a Community Radio Station by law.

[14]The concept of participation by the community in the station – even if members of the community have been presenters – should consistently be taken into consideration. And this has, in the view of the CCC, been lacking. To support this conclusion, it is important to consider Regulation 10. The essence of Regulation 10 is community participation and “ownership”. It provides as follows:

- (7) *Ownership and Control of Community Television and Community Radio:*
- (a) *a Licensee must be owned by community members with the Board of Directors as custodian of the licence.*
 - (b) *a Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.*
 - (c) a Licensee must be managed by person(s) tasked by the Board of Directors to ensure the licensee's daily operation. However, this excludes a private company since a community television or class sound community radio is non-profit.
 - (d) The Board of Directors/ Trustees and station management must not occupy dual roles with regard to being managers/presenters at the radio station.
- (8) The programming of community television or community radio must meet the needs of community members within its broadcasting coverage area by encouraging the following:
- (a) The participation of community within its coverage area in the production of content; and

- (b) The majority of content produced must be from the coverage area. This is to ensure that involvement of content producer(s) outside the coverage area is limited as to enable the reflection and participation of local producers.
- (9) If a licensee decides to employ the services of a content producer(s) outside the coverage area, it must be relevant to the community and must include community members' inputs through community structures such as membership or listeners' associations or viewers' associations.

[15] Thus, to sum up:

(1) There is no basis in law for the CCC to advise Council, on the evidence before the CCC, that the licensee's financial affairs must be inquired into. The licensee has annually filed its financial statements as *audited*. More than that cannot be required in law, unless there is clear evidence of fraud. There was no such evidence before the CCC.

(2) There is also no reason to order an Annual General Meeting – the AGM of the Company is to be held as soon as the audited financial statements are received. Meetings with the community should, however, rather be the priority and we deal with that hereunder.

(3) The contact which the radio station has had with the community it serves, however, does not comply with its licence and the Regulations. The omission amounts to a contravention of Regulation 10A(7) and (8) quoted above in footnote 6. Although some efforts have been made to draw on the expertise of the community, this does not accord with what is, by law, expected from a Community Radio Station. The concept of participation by the community in the station – even if members of the community have been presenters – should consistently be taken into consideration. And this has, in the view of the CCC, been lacking. The essence of Regulation 10 is community participation and “ownership”. It provides as follows:

(7) Ownership and Control of Community Television and Community Radio:

- (a) a Licensee must be *owned* by community members with the Board of Directors as custodian of the licence.
- (b) *a Licensee must encourage the community within its coverage area to participate in ownership, management of television station or radio station.*
- (8)
- (9) If a licensee decides to employ the services of a content producer(s) outside the coverage area, it must be relevant to the community and must include community members' inputs through community structures such as membership or listeners' associations or viewers' associations.

ADVICE TO COUNCIL AS TO AN ORDER

Council is, with respect, advised to issue the following order in terms of section 17E(2)(c) of the ICASA Act:⁷

(a) Breakthrough Communications must hold at least one public meeting with its adult listeners before 16 March 2019. And, in any case, at least twice per financial year.

(b)The date, time of commencement and location of the meeting must be broadcast between 08:00 and 12:00 for twenty days before the day of the meeting and the meeting must be held in Hermanus (the licensee paying for the venue) on a Saturday afternoon and the Compliance Officer from ICASA must also be invited to this meeting – as is the case, with other meetings of the community or the licensee.

(c) In so far as the agenda is concerned:

⁷17(e) (2)(c): The Complaints and Compliance Committee may recommend that one or more of the following orders be issued by the Authority, namely -

...

- (c) **direct the licensee to take such remedial or other steps[not] in conflict with this Act or the underlying statutes as may be recommended by the Complaints and Compliance Committee;**

1. The Board of Breakthrough Communications must, with the approval of the ICASA Liaison Officer, appoint a Chair for a meeting with the community and he or she will call the meeting and determine an Agenda for the meeting, which may be added to with his or her permission at the first meeting.
2. The Board of the Company (the licensee) must have at least one representative at the meeting.
3. Most prominently, the following must be on the agenda and placed on the website of the Radio Station and referred to in the broadcast:
 - (a) That a Community Committee of six adult community members be elected for a term of two years.
 - (b) That the Community Committee, from their number, elect a Chairperson of the Committee.
 - (c) That the Community Committee, after consultation with the full time staff and the Board of the licensee, in a spirit of co-operation, review the policies of the radio station within the ambit of the applicable law.
 - (d) That the policy be conveyed to the Board of Directors and be regarded as the Broadcasting Policy of Whale Coast FM.
 - (e) That employees of the radio station remain in the employ of the Licensee, subject to their contracts.
 - (f) That the Committee remain in office for a term of two years and may be re-elected at a Community meeting.
4. A full report must be filed by the licensee with ICASA before 30 April 2018.
5. A further meeting by the licensee with the community must be held before the end of July 2019. As required two meetings per financial year must be held with the listeners and a report of each meeting must be filed with ICASA via the Compliance Officer. ICASA's Compliance Officer for the Station must also be invited to the above meetings of the Community and the Committee referred to.

6. The Committee elected must call the community meetings and the radio station must advertise such meetings for 10 days before the meeting at the request of the Committee.
7. Two meetings with the community per financial year must be held and the Board of Directors of the licensee must be invited to attend.
8. Minutes of all meetings must be kept and copied to the ICASA liaison officer.
9. The Board of Directors of the *licensee* must also, at its 2018 Annual General Meeting, appoint a further three directors, after consultation with the said community committee.

J. C. W. van Rooyen

JCW VAN ROOYEN SC 30 October 2018

The Members concurred with the judgment and order advised to Council.