

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 29-05-2008

Case number: 20 / 2008

In the matter between

YFM

COMPLAINANT

and

Radio iGagasi 99.5 FM

RESPONDENT

**Monitoring and Complaints Unit of
the Independent Communications
Authority of South Africa**

INTERVENING

Complaints and Compliance Committee

Mr Justice R Mokgoatheng: (Chairperson)

S. Thakur: (CCC member)

T. Matshoba: (CCC member)

JCW van Rooyen SC: (Councillor)

For the Intervening Party:

Monitoring Complaints Unit Senior Manager for Licensing: Mr. Bruce Mkhize

Assisted by: Monitoring Complaints Unit Manager: Ms. Fikile Hlongwane

For the Complainant:

Attorneys Rosin Wright and Rosengarten, Johannesburg: Mr. Mark Rosin

Assisted by Mr. Dan Rosengarten, Ms. Mabushle Mbongo and Mr. Randall Abrahams

Station Manager: YFM: Mr. Kanthan Pillay

¹ In terms of s 17C of the ICASA Act 13 of 2000 as amended

Programme Manager: YFM:

Mr. Vukile Zondi

For the Respondent:

Attorneys Webber Wentzel Bowens, Johannesburg:

Mr Peter Grealy

Managing Director: iGagasi 99.5 FM:

Ms. Pearl Sokhulu

JUDGMENT

JCW VAN ROOYEN SC

[1] Y-FM is a radio station which broadcasts in Gauteng and Radio iGagasi 99.5 FM broadcasts in Natal. Y-FM has lodged a complaint with ICASA that iGagasi 99.5 FM is not complying with its license conditions in that it is not broadcasting the format of music (“adult contemporary jazz format”) which it is obliged to broadcast in terms of its conditions. The Monitoring Unit of ICASA investigated the complaint and came to the conclusion that iGagasi 99.5 FM had not contravened the said condition. The Unit is an intervening party in the dispute before the Complaints and Compliance Committee.

[2] The complaint of Y-FM reads as follows:

1. Approximately one year ago Radio P4 Durban re-launched itself as iGagasi 99.5 FM. YFM has observed the changes that have been implemented at iGagasi 99.5 FM over this period and on the basis of our observations wish to challenge iGagasi 99.5 FM's current programming strategy as we believe that it is in contravention of their license conditions.
2. iGagasi 99.5 FM's License (License Number 009\PRI\R05 issued to Radio P4 (PTY) Ltd) states that:
 - a. "The licensee must broadcast an adult contemporary jazz format" (Schedule C: clause 2);
 - b. "English is the principal broadcast language" (Schedule C: clause 3);
 - c. Clause 8.5 of the license reads "The licensee may not between 05h00 and 23h00 change more than fifteen percent of its format as described in Schedule C".
3. YFM respectfully submits that IGagasi 99.5 FM 99.5 FM is broadcasting in compliance with these license conditions.
4. YFM has informally monitored the IGagasi 99.5 FM's broadcast between December 2006 and March 2007 and has formed the impression that the iGagasi 99.5 FM's music falls broadly within the urban contemporary and

R&B formats. On 16 January 2007, YFM's music manager monitored the station between 13h30 and 15h40 and formed the following conclusion "80% of the songs played were up-tempo Durban Kwaito songs as well as very popular house music and then sprinkled with youth R&B and Hip Hop". YFM submits that this constitutes a contravention of Schedule C: Clause 2 in iGagasi 99.5 FM's license conditions.

5. iGagasi 99.5 FM themselves appear to acknowledge this contravention:
 - a. On Thursday 22 March 2007, their website ([www.iGagasi 99.5 FM.co.za](http://www.iGagasi99.5FM.co.za)) noted that "Our music format is predominantly R&B, Classic Soul and of course LOCAL (Afro Pop and Kwaito)". YFM submits that this statement constitutes a clear acknowledgement that iGagasi 99.5 FM is broadcasting outside of their license conditions;
 - b. In the December 2006 issue of Advantage magazine, iGagasi 99.5 FM station manager Pearl Sokhulu was quoted as saying "This is achieved by lively on-air talent and broadcasting in English and Zulu, as well as a play list made up of urban and R&B genres. Our listeners are strong supporters of local music and while other stations play traditional music, we cater for those looking for the freshest sounds in Afro Pop and Kwaito" (Advantage December 2006:23, YFM emphasis). YFM submits that this statement constitutes further acknowledgement by iGagasi 99.5 FM management that the station is broadcasting in non-compliance with their license conditions.
6. In addition to iGagasi 99.5 FM's apparent contraventions with respect to their licensed format, it appears that iGagasi 99.5 FM is broadcasting in contravention of their license conditions."

[3] That there is substantial difference of opinion on what "adult contemporary jazz format" means not only emerged during the hearing of this matter, but is also evident from what iGagasi 99.5 FM said at the hearing for the renewal of its license in 2004. The Council committee, which heard the application, also agreed that there was not sufficient evidence that there had been a contravention of this requirement. It also said that the matter should be

inquired into generally by ICASA. As part of the present process, the Monitoring Unit of ICASA was also of the opinion that there had been no contravention.

[4] Mr Randall Abrahams, who has gained wide expertise of modern music formats, testified on behalf of Y-FM that iGagasi 99.5 FM has been broadcasting music outside the format as set out in its license condition. Examples were played at the hearing. Ms. Pearl Sokhulu, Managing Director of iGagasi 99.5 FM, differed from him in most instances in her testimony before the CCC.

[5] It was argued on behalf of iGagasi 99.5 FM that since the license of iGagasi 99.5 FM states that “the licensee is bound by all statements, undertakings, promises and representations made by, or on its behalf, or in connection with the application for the license” reference should also be had to what was said during the hearings in 1996 and 2004. From these hearings it does appear that iGagasi 99.5 FM had given explanations of what it meant by “adult contemporary jazz format” and that these explanations illustrated the width of the term. In fact, it was argued that the license conditions should have been amended to reflect this.

EVALUATION

[6] In *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) O’Regan J states the following at paragraph [47]:

“It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.” (emphasis added in bold)

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001(1) SA 545 (CC) Langa DP (as he then was) states at paragraph [24]:

“On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. **On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.** A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read ‘in conformity with the Constitution’. **Such an interpretation should not, however, be unduly strained.**” (emphasis added in bold).

Also compare what Chaskalson P (as he then was) states in *S v Lawrence; S v Negal; S v Solberg* 1997(4) SA 1176 at para [33] as to the unacceptability of arbitrariness in the application of an Act or regulations. Also compare as to legislation which is not narrowly tailored, *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002(4) SA 294(CC) at par [51], where Langa DCJ (as he then was) required that the Code for Broadcasters should be “appropriately tailored and more narrowly focused”, insofar as it prohibited broadcasts which were likely to harm relations between sections of the public. The Court limited the said phrase by way of notional severance to what is prohibited in section 16(2) of the Constitution of the Republic of South Africa. Also see the Court’s observations as to certain other provisions of the IBA Act’s Broadcasting Code (at the time in a Schedule to that Act) in par [52] of the judgement.

[7] The delineation of rights and duties in licenses should also comply with the above tests. A contravention of these license conditions may lead to substantial administrative penalties by ICASA and, although these penalties cannot be equated with sanctions in criminal law, they could substantially affect a licensee both economically and as to its standing in the sector. The statement in *Dawood (supra)* by O’Regan J at paragraph [47] that the Rule of Law requires that rules be stated in a clear and accessible manner is, with respect, not met by the wide and vague terminology in the “adult contemporary jazz format” condition. O’Regan J also states:

“Those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.”

The learned Justice also states the following at paragraph [48] of the said judgment:

“In a constitutional democracy such as ours the responsibility to protect constitutional rights in practice is imposed both on the Legislature and on the Executive and its officials. The Legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.”

[8] Schedule A, clause 14.3 of the license of iGagasi 99.5 FM states that it is bound by “all statements, undertakings, promises and representations made by it, or on its behalf, or in connection with the application for the license.” No definite meaning can be attached to these words. Licenses are public documents and should be understandable to all concerned. How would a third party, who was not part of the procedure before the IBA or ICASA, ever know what these promises etc were? If there were promises, such promises should be included in the license conditions explicitly – see section 9(7) of the Electronic

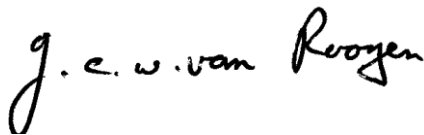
Communication Act No.36 of 2005 (ECA). Resort can, therefore not be had to such undertakings. Of course, that does not take the present matter further and, in fact, makes it much more difficult to interpret the condition.

[9] It is not within the powers of the CCC to invalidate a license condition as a result of its vagueness or its being open to subjective interpretation. Nevertheless, to find that a broadcaster has contravened such a condition becomes all the more problematic in such cases. Obviously there would be clear cut cases. However, it would be risqué to express an opinion as to what such clear cut cases would be, given the debate about format. In the present case even an ICASA committee has expressed the view that a further inquiry was necessary.

[10] In the result we are of the opinion that it is impossible on the evidence before us to conclude that iGagasi 99.5 FM has contravened the license condition under discussion. The license condition is reasonably open to different interpretations and the evidence too scant to come to a firm conclusion that there has been a contravention.

The complaint is not upheld.

The Chairperson, Mr Thakur and Ms Matshoba concurred in the above judgment of JCW van Rooyen.



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JCW van Rooyen

For: CHAIRPERSON OF THE CCC