

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 17 March 2017

Case Number: 213/2016

ZAMDELA MINISTERS' ASSOCIATION

COMPLAINANT

v

KARABO FM

RESPONDENT

PANEL: Prof JCW van Rooyen SC; Councillor N Batyi; Prof K Moodaliyar; Mr J Tlokana; Ms M Ramokgopa

APPEARING before the CCC:

President of the Complainant: Bishop Dr TS NGCANA

From the Radio station: Mr T Pinkwane, Mr M Mabe (Manager) and Mr D Sinthumule

CCC: Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW VAN ROOYEN SC

PARTIES TO THIS MATTER AND LOCUS STANDI (STANDING)

[1] Karabo FM, the Respondent in this matter, is a licensed community broadcaster in terms of section 50 of the Electronic Communications Act 2005("ECA"). Its licence was issued to it by the Independent Communications Authority of South Africa ("ICASA") on 14 June 2014. The licence period is from 8 December 2013 to 7 December 2018. The licence permits it to broadcast in Sasolburg and surrounding areas in the Free State Province of the Republic of South Africa.

¹ The CCC is, as recognised by the Constitutional Court, an Independent Administrative Tribunal at ICASA.

[2] The Complainant, Zamdela Ministers' Association ("ZAMA"), is a voluntary association which acts in the interests of members of a Christian section of the community, within the licence area of Karabo FM. As an association with members in the community served by Karabo FM, ZAMA is entitled to take part in Karabo FM's Community Forum. This role of the community accords with the requirements for a community broadcaster as provided for in section 50 of the ECA. The Constitution of Karabo FM also expressly allows for *organisations*, which share the aims and vision of the station, to take part in its Community Forum.² ZAMA, accordingly, as an association, has a legally recognised interest in the radio station. In fact, the Constitution of Karabo FM provides that the community forum shall be the highest decision making body of the station. The Community Forum, also, constitutes the Annual General Meeting, according to the Constitution of Karabo FM.³

[3] The Representatives of Karabo FM argued in their papers before the CCC that Zamdela Ministries is not entitled to be a complainant in this matter. Dean Mkhwanazi is the person who alleges to have suffered prejudice and the complaint should, thus, have been lodged before the CCC by him.⁴ The first question before the CCC is, accordingly, whether ZAMA has *locus standi* ("standing") in this matter. According to section 38(e) of the Constitution of the Republic of South Africa 1996 an association acting in the interests of its members may approach a court in that capacity. Read with section 34 of the Constitution of the RSA, it would include an

² The licence conditions, imposed by ICASA, inter alia, provide as follows: 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 meetings annually with its community on programming** and programme-related matters for the selection and provision of programmes; 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. **The Constitution of Karabo FM provides in clause 8.3 that "[t]he Community Forum shall be made up of any individuals or organisation who shares the aims and objects of KaraboFm, as set out in this Constitution."**

³ It should be observed that the Forum should, according to the licence conditions, be a separate body. For purposes of this judgment we will, however, not go into this aspect. It might be a matter which Compliance should discuss with the station.

⁴ It should be mentioned that initially, he did correspond with Compliance. However, when the matter was directed at the CCC itself, Zamdela Ministries was the Complainant.

independent and impartial tribunal such as the Complaints and Compliance Committee at ICASA.⁵ Since one of its members, in fact the Deputy-President of ZAMA, was removed as Chairperson by the Karabo FM Board, allegedly in conflict with the Constitution of Karabo FM, ZAMA does have standing insofar as this matter is concerned. It would be acting in the interest of its members generally and not, for example, *solely* in the interest of the right to dignity of its Deputy President, in which case it would not have had standing.⁶

JURISDICTION

[4] Section 17B of the ICASA Act 2000, as amended, provides that the Complaints and Compliance Committee at ICASA has jurisdiction over licensees and to inquire into and hear, if appropriate, a complaint from a member of the public or a reference to the CCC by a compliance division at ICASA. In the normal course, the CCC establishes whether a licence condition – as in the licence itself, or as a duty imposed by the relevant legislation - has been contravened. If a contravention is found, the CCC advises the Council of ICASA as to a possible order against the radio station. This ICASA system of control over licensees has been held by the Constitutional Court to be in accordance with the Constitution of the Republic of South Africa.⁷

In the matter before the CCC there is a complaint filed by a voluntary association which has standing to file a complaint with the CCC, as held above. The Respondent is a licensee, and the conduct complained of, falls under the jurisdiction of the CCC, as indicated above.

⁵ Cf. *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) where it was held that the CCC is an administrative tribunal and that there is nothing in the ICASA Act which impinges upon its independence.

⁶ *Western Cape Residents' Association obo Williams and Another v Parow High School* 2006(3) SA 542(C)

⁷ Cf. *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC).

THE COMPLAINT

[5]What is at stake in this matter is whether Karabo FM has acted within its Constitution, which forms part of its licence conditions.

The Complaints by ZAMA, in essence, amount to the following:

- (1) That the chairperson of the Board, Dean Mkhwanazi, had, in conflict with the Constitution of Karabo FM, been removed as Chairperson of the Board after a vote of no confidence in him by the Board on 5 May 2016 ;
- (2) That the said Chairperson's membership of Karabo FM had been withdrawn by the Board from the same day, in conflict with the Constitution of Karabo FM;
- (3) That Karabo FM had failed to act in accordance with its Constitution when the Board revoked Zama activities on the Community Forum (and thus, also its right to take part in the Annual General Meeting) and, with one week's notice, cancelled a broadcasting slot it had on Karabo FM in a letter dated 14 June 2016.

THE DEFENSE

[6] The defence of Karabo FM is that its Board was authorised by its Constitution to take steps to remove the Chairperson. It was argued that when the AGM is not in session, the Board, according to the Constitution of the Radio station, has all the AGM's powers in terms of the Constitution. In the Radio Station's view the Board was justified in removing its chairperson since he was conflicted – being involved in ZAMA. Thus, a vote of "no confidence" was justified on this ground. It is not necessary to deal with other reasons mentioned to the AGM in 2016.

DECISION ON THE MERITS OF THE COMPLAINT

We will now deal with each of the three complaints:

First Complaint

[7] We shall *first* deal with the resolution on 5 June 2016 by the Board to remove the Chairperson from his position as Chair of the Board.

Clause 9.12, read with clause 10 of the Karabo FM Constitution, addresses the election of Board members during an Annual General Meeting. It provides that the Board shall consist of seven to ten members, who are stipulated to be the following:

- Chairperson
- Deputy Chairperson
- Secretary
- Deputy Secretary
- Treasurer
- Five additional members

[8] It is common cause that Dean Mkhwanazi had been elected as Chairperson by the Annual General Meeting and also that he was later on removed by the Board as its Chairperson, basing the removal on a “vote of no confidence” and conflict of interest. A letter from the Board dated 4 May 2016 (the date of which was questioned, since the Board meeting allegedly took place on 5 May 2016) was taken to the Chairperson on behalf of the Board. He, however, refused to sign for it. The letter was written to him by the “interim chairperson.” After having taken note of the contents of the letter he gave it back to the person who had taken the letter to him. A copy of this letter forms part of the documentation before the CCC.

[9] It is clear from the Constitution of Karabo FM that it is the Annual General meeting which elects and decides who would fill the different posts on the Board as set out above. The AGM is, thus, clearly endowed with the authority to elect the Chairperson. By doing that it exercises its right in a democratic manner. It would be patently in conflict with that election if the Board, later on at a Board meeting, as it were, rejects that election by way of a resolution framed in the form of a “vote of no confidence.” The confidence in the Chairperson had already been demonstrated by the vote at the Annual General Meeting. There is no manner in which the Board of Directors may circumvent that vote by way

of a resolution of “no confidence”. To base the vote of no confidence on the fact that the Chairperson is conflicted (as a result of his position within ZAMA) is also not an acceptable ground. The AGM had elected him and that is the end of the matter – whatever his political or religious affiliation is. Although the Board is empowered to act in the place of the AGM when it is not in session, it plainly would not have the authority to remove the Chairperson. The election of the Board members is based on democratic principles exercised by the AGM. That is a power which, clearly, only the AGM may exercise.

Thus: the dismissal of the Chairperson by the Board amounts to an *ultra vires* rejection of the democratic vote of the AGM. Judge of Appeal Navsa has emphasised that decision-making, within this democratic state, must consistently remain within the powers vested in a body licensed or empowered under the Constitutional dispensation. The learned Judge of Appeal states as follows in *Gauteng Gambling Board v MEC for Economic Dev, Gauteng* 2013(5) SA 24 (SCA) at para [1]:

“Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. *It is central to the conception of our constitutional order that the legislature, the executive and judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law.* Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of provincial government not acting in accordance with these principles.”(emphasis added, footnote omitted).⁸

[10] Thus, whatever may have been the reason for the resolution taken by the Board – it was null and void, since the Board does not have the authority to remove the Chairperson. The Constitution sets out circumstances under which any member, including a Board member, could be subjected to a disciplinary tribunal in terms of clause 16 of the Karabo FM Constitution. Since the Constitution provides that there could be an appeal to the Board, a Board member would not qualify as a member of the disciplinary tribunal. For

⁸ Also see Navsa JA’s judgment in *Gerber and Others v Member of Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

purposes of the matter before the CCC, it would serve no purpose to go into this possibility further. Without the appointment of an external disciplinary committee no valid removal could have taken place. Lack of confidence in a Board member or the Chairperson is, in any case, not a sufficient ground to institute a disciplinary hearing – it is not “conduct unbecoming” within the Constitution of Karabo FM. The mere fact that a member of the Board or the Chair comes from a certain group within the membership, is a typical feature of freedom of choice exercised by the majority at an Annual General Meeting. That would also not, as such, constitute a justifiable conflict of interest. *Members of the community have elected that person and that is the end of the matter.*

The complaint that the Chairperson was removed in conflict with the Constitution of Karabo FM is, accordingly, upheld.

Second Complaint

[11] The *second* issue is whether the Board had the authority to cancel the Chairperson’s membership. The effect thereof would, of course, also be to remove his right to be elected as a Board member or vote at an Annual General Meeting.

Clause 12 of the Constitution of Karabo FM states the rights and responsibilities of the Board. It includes the following:

12. The majority of (the) board shall have the authority to terminate the membership of any member.
13. If a member of the board contravenes/behaves in an unbecoming (manner) he/she shall be deemed unfit to remain a board member.”

[12] There is no manner in which the Board may simply have cancelled Dean Mkhwanazi’s membership of Karabo FM. This is a power which it may only exercise after having followed the prescribed disciplinary procedure in clause 16 of the Constitution of Karabo FM. The decision to terminate membership may only be taken after a Board of Inquiry had been appointed and that body had acted in terms of the Constitution in a procedurally fair manner.

Clause 16(6) of the Constitution provides as follows:

A disciplinary hearing may be instituted for the contravention of the Karabo FM

Code of Conduct or any behaviour considered being misconduct by the Management Committee, Board of Directors or the Community forum.

[13] Clause 16(6) raises serious questions of validity. In fact, it is not in accord with the basic principles of justice in our constitutional state. Clarity as to what constitutes “misconduct” cannot in law be made dependent on what is considered to be misconduct by, inter alia, the Board of Directors. Vague criteria are also unacceptable.⁹ It is true that the term “conduct unbecoming” (as is to be found in clause 12.13 of the Constitution of Karabo FM) is to be found in many disciplinary documents. Yet, the following words of Judge Broome in *Boswell & Others v Union Club of South Africa* [1985] 1 All SA 9 (D) are clearly applicable to the matter before us:

The committee were aware of the existence of the constitution, they failed to afford it any attention or consideration, they entirely disregarded it. As far as I am aware they made no attempt whatsoever to understand it or to apply it. It seems clear that they were determined to get rid of the plaintiffs whom they regarded as trouble-makers and they, the committee, did not care whether they acted in obedience or in contravention of the constitution. They must have foreseen the possibility that they might have deviated from the constitutional procedures yet they pressed on without regard. This is the most probable inference to be drawn from all the evidence, particularly that of hostility, prejudice, and of being incensed, following, as it did, an improper cover-up which resulted in a proper and reasonable, albeit informal, request to the chairman to convene a special committee meeting.

[14]The cancellation of membership is a serious matter. To have effected it without a hearing by a committee appointed in terms of clause 16 of the Constitution of Karabo FM amounted to a gross violation of the Constitution of Karabo FM. In any case, if the complaint was that Dean Mkhwanazi was conflicted as a result of his membership of ZAMA or even that, in the view of the Board, he was not an efficient chairperson, that would not have been a ground to remove his membership – as pointed out

⁹ The Constitutional Court has found legislation which is vague to be constitutionally invalid. Compare *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC); *Islamic Unity Convention* 2002 (4) SA 294 (CC); *De Reuck v DPP and Another* 2004(1) SA 406(CC) and the view expressed by three judges in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC).The same principle will undoubtedly also apply in regard to a vague provision in a Constitution of a radio station which places membership at risk with vague language based on the mere view as to what is unacceptable of the Board which initiates the complaint.

above. He was elected by the AGM and the Board would have to accept that. “Conduct unbecoming” is far removed from the allegations which were made in the documentation before the CCC: including documentation provided to the CCC after the hearing as to what was reported to the AGM on the 16th September 2016. In any case, removal was not a matter within the jurisdiction of the Board without a full inquiry by an independent committee appointed by the Board. Even suspension, pending an inquiry, does not lie within the powers of the Board. In any case, there was no valid reason for the dismissal as Chairperson or even his referral to a Disciplinary Committee – had that been done.

The second complaint is also upheld.

THIRD COMPLAINT

[15] Lastly, we should also deal with what is called “the suspension of Zamdela Ministers’ Association from Karabo Activities.” The documentation before the CCC, judged as a whole, indicates the following: that the Board, as constituted after Dean Mkhwanazi had been removed as chair and his membership cancelled, decided (as stated in a letter of 14 June 2016) that the “ZAMA Association slot on Karabo FM will be revoked as of 20 June 2016.”

The following was also stated in Karabo FM’s answer to questions raised by the Coordinator of the CCC (para 2 – dated 9 November 2016):

In terms of Clause 12.7 which states that the Board of Directors has a responsibility (to) ‘recommend affiliation of Karabo fm to other bodies’. We would like to assure the CCC that ZAMA and the Board of Directors of Karabo FM had never entered into any form of agreement or earn recognition as a group. But we acknowledged their members as ordinary members of the community. We still maintain that we do not possess or recognise any form of group/organisational memberships. Furthermore consider Clause 12.14 which states that ‘(t)he Board of Directors shall have the authority to delegate any power to any group, Body, commission and sub-committee.’

[16] Although it was conceded by ZAMA that the arrangement of an on-air slot for ZAMA was not documented, it is undisputed that a broadcasting slot had previously been made available to ZAMA and that the Board had

cancelled it from 20 June 2016, in a letter dated 14 June 2016.

[17] Whilst it is important that a broadcaster generally has the right to decide on the content of its broadcasts, the function of a community broadcaster, in terms of the ECA, is particularly orientated towards the particular community that it serves. Section 50 of the ECA provides a background to this function:

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;**
- (e) ...

[18] Section 50(d) is particularly relevant in regard to the ZAMA slot. Although there was no formal agreement with ZAMA, the relevant community should have been consulted and a resolution by the “community” in this regard have been obtained. The manner in which this is done, in accordance with the Karabo FM Constitution, is by way of a resolution at the AGM. It is a matter which concerns a section of the community *directly* and, *in such a case*, a resolution by the AGM should have been sought in this regard.

The CCC will, accordingly, in its advice to Council, advise that the slot be ordered to be re-instated immediately.

FINDINGS ON THE MERITS OF THE MATTER

[19] The finding of the CCC is, accordingly, as follows:

- (a) That the removal by the Board of the Chairperson, Dean Mkhwanazi,

was not authorised by the Constitution of Karabo FM and was, accordingly, null and void from its inception;

- (b) That the cancellation of the membership of Dean Mkhwanazi was not effected in terms of the Constitution of Karabo FM and was, accordingly, null and void from its inception – in any case, there had been no acceptable reason for a referral to a disciplinary committee.
- (c) That the cancellation of the broadcasting slot provided to ZAMA on Karabo FM was invalid;
- (d) That the revocation of ZAMA as a member of the Community Forum was in conflict with the Constitution of Karabo FM, which entitles the association to membership of the Community Forum and, in line with the Constitution of Karabo FM, membership of the AGM.

APPROACH TO THE INVALIDITY: ORDER ADVISED TO COUNCIL

[20] The core question is how to approach these invalidities. It would be impractical to set aside all Board meetings which were held after the removal of Dean Mkhwanazi. The same principle would apply to the Annual General Meeting of 2016. It has been held by the Supreme Court of Appeal that administrative acts which are based on invalid decisions must first be set aside. It is clear from that judgment that certain invalid acts would, in practice, be impossible and impractical to set aside – given the effect which they already had.¹⁰ However, now that the Karabo FM matter has been considered by the CCC, certain steps would, in any case, be practical and legally justified for the Council of ICASA to order.

ADVICE TO COUNCIL

The CCC's advice to the Council of ICASA is to issue the following order:

1. That the next Annual General Meeting of Karabo FM be held with due

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

notice before 1 August 2017.

2. That an election of all the Board members, as prescribed in the Constitution of Karabo FM, be placed on the Agenda for the said Annual General Meeting.
3. That the term of the present Board members ends immediately after the election of Board members, as aforesaid, has taken place.
4. That the membership of Dean Mkhwanazi of Karabo FM is declared to be valid from the date that it was cancelled and is hereby re-instated from that date, which was 5 May 2016.
5. That the Zamdela Ministers' Association's broadcasting slot, with immediate effect, be re-instated at the same time and day slot.
6. That the Zamdela Ministers' Association is permitted as per the licence conditions of Karabo FM to take part through its chairperson (or a person nominated in writing by the Chairperson) in Annual General Meetings and has one vote in addition to his or her vote as member. Other members of the Association would have individual votes as per their personal membership of Karabo FM. The same principle would apply if a separate Community Forum meeting is held.
7. That Karabo FM broadcast, within seven days from the day that this judgment is published by the Coordinator of the CCC, between 06:30 and 08:15 as **first item** on a news bulletin the following statement (on the first day in Sesotho on the second day in English), without any background sounds, the following statement as a first item for three days: (The statement in Sesotho follows upon the statement in English hereunder)

The Council of the Independent Communications Authority of South Africa has directed this station to broadcast the following:

- (a) That the removal by the Board of Karabo FM of Dean Mkhwanazi as the Chair of the Board of Karabo FM was not authorised by law and invalid.**
- (b) That the removal of Dean Mkhwanazi as a member of Karabo FM was invalid in law and he is re-instated as member.**
- (c) That the radio slot on Karabo FM for Zamdela Ministries be re-instated with immediate effect.**

- (d) That Zamdela Ministries' right to take part in the Annual General Meeting (and Community Forum, if held) of Karabo FM is re-instated with immediate effect.**
- (e) That an Annual General Meeting must be called before August 2017.**
- (f) That a new Board and Chairperson be elected at the said Annual General Meeting.**
- (g) That the term of the present Board and Chairman of the Board of Karabo FM comes to an end immediately after the election of the new Board.**

The above statement, in Sesotho, follows hereunder:

Sesotho:

Bookamedi ba lekgotla le ikemetseng la dikgokahanyo la Afrika Borwa le laetse seteishene sena sa kgaso tse latelang:

- (a) Hore ho tloswa ha Dean Mkwanazi jwalo ka Modulasetulo (Chairperson) wa Bookamedi (Board) ke Bookamedi ba Karabo FM ha ho a dumellwa ke molao mme ketso eo ha ena matla.
- (b) Hore ho tloswa ha Dean Mkhwanazi jwalo ka setho sa Karabo FM ha hona matla molaong mme o kgutlisetswa jwalo ka setho.**
- (c) Hore karolo eo ya kgaso ho Karabo FM ya Zamdela Ministries e kgutlisetswe hang hang kgasong.
- (d) Hore tokelo ya Zamdela Ministries ho nka karolo Kopanong ya Kakaretso ya Selemo (le Lekgotla la Setjhaba, ha eba le tshwarwa) ya Karabo FM ha e tshwarwa kapa e dula, e fuwa le ho kgutlisetswa matla hang hang.
- (e) Hore ho etswe pitso ya Kopano ya Kakaretso ya Selemo pele ho kgwedi ya Phato 2017.
- (f) Hore ho kgethwe Bookamedi bo botjha le Modulasetulo ha kopano eo e tshwarwa kapa e dula.

(g) Hore nako ya pehelo ya Bookamedi le Modulasetulo wa yona ya Karabo FM e fihla pheletsong hang hang ka morao ho dikgetho tsa Bookamedi bo botjha.

Karabo FM must send a copy of the above broadcasts to the Broadcasting Compliance Division of ICASA within seven days from the broadcast, confirming the time and date of the broadcast.



**JCW van Rooyen SC
Chairperson**

20 April 2017

The Members concurred with the judgment.

