

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of hearing: 27 February 2019

CASE NO: 313/2018

EXTRISERVE (PTY) LTD T/A LM RADIO

Complainant

GAUTENG MEDIA DEVELOPMENT PROJECT NPC t/a HOT 91.9 FM

Respondent

Tribunal

JCW van Rooyen SC

Dr Keabetswe Modimoeng (ICASA Councillor)

Mr Peter Hlapolosa

Mr Jacob Medupe

Prof Kasturi Moodaliyar

Mr Jack Tlokana

Mr Eric Nhlapo from LM Radio on behalf of the Complainant

For the Respondent: Adv J Berdou instructed by Falcon & Hume (per Ms Heather Irvine/Daniel Clark) Sandton.

Ms Meera Lalla from the Office of the Coordinator.

Coordinator: Ms Lindisa Mabulu

JUDGMENT

JCW van Rooyen

COMPLAINT

[1] A complaint against the Respondent Broadcaster, Gauteng Media Development Project NPC t/a HOT 91 FM (“HOT 91”) was lodged by Extriserve (Pty) Ltd t/a LM Radio.

[2] The Complaint concerns alleged transgressions by Hot 91 of its duties as a community broadcaster. The essence of the complaint, sworn to by the Complainant, reads as follows:

¹ The Complaints and Compliance Committee (“CCC”) is an Independent Administrative Tribunal at ICASA set up in terms of the Independent Communications Authority Act 13 of 2000. Its constitutionality as an independent Administrative Tribunal has been confirmed by the Constitutional Court. It, inter alia, decides disputes referred to it by ICASA 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 Consumer and Compliance Affairs 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 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 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.

1. As per ICASA Annual Compliance Report of March 2017 by the relevant ICASA Division: Hot FM failed to comply in providing required information in accordance with the Compliance Manual Regulations (CPMR) of ICASA.

2. Hot FM is consistently contravening the Regulations on local content quotas.

3. Extriserve, as licensed as Adult Contemporary Music format, suffers an untold financial prejudice as Hot FM contravenes its licence conditions regarding 60% local content, 30% talk and 70% music. Reference is made to Extriserve's Licence conditions.

4. Hot FM plays a minimum South African music. On average HotFM plays less than 25% South African Music daily as per (ICASA) Annual Compliance Report 2017 and less than 30% during the months of July, August, September as per automated logging. Our internal monitor exercise from the 2nd October to 10 October covering over 36 hours of HotFM programming logged on 23 South African songs compared with 327 international tracks (See Annexure B). Hot FM clearly behaves as commercial broadcaster. This is clearly prejudicial to the business of Extriserve. As per the ICASA Compliance Report during 2015-2016 financial year reported instances of non-compliance are the following:

(a) On community participation as per clause 4.2.1. and 4.2.2 of the schedule to its licence, Hot FM does not fully comply with the requirements of clause 3.4.

(b) On programming as per 3.4. of the Schedule to its licence, Hot FM failed to broadcast 30% of local news. Under period of review Hot FM did not fully comply with the requirements of clause 3.4.

(c) Clause 5.1.2 the Schedule to Hot FM Licence, Hot FM is required to broadcast 60% South African Music content. Monitoring reveals that the licensee broadcast less than 25% South African Local Music. Hot FM during the period in review failed to comply.

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7. Clause 4.1 of the SA Music Regulation requires Hot FM to meet the 60% music quota as prescribed by South African Music Content Regulations. Under period of review Hot FM failed to comply.

8. As per clause 4.3 Hot FM must submit information according to the Compliance Procedure Manual Regulation (CPMR). Hot FM did not submit the required information and failed to comply with clause 4.3.

9. As stated in the Compliance Report as a concerning factor is that community radio sector does not have any shareholding structure as there are no shares to acquire, no HDG equity stake or dividends. Extriserve requests the CCC to investigate the matter.

RECENT INSTANCES OF NON-COMPLIANCE

10. In the period 2 October – 10 October 2018 in a 36 hour day-part monitoring done by Extriserve. Hot FM played just 7% local music. In a total number of music tracks of 327 only 23 were South African. See Annexure B.

11. As per 36 hour day-part monitoring Hot FM appears not to comply with 30% talk stipulation. Only 36 minutes was devoted to interviews with guests.

12. Statistics obtained from automated radio logging services show that Hot FM did not comply with South African Music requirements in the months of July, August, September and October 2018 .

The automated radio logging service is available for perusal at AFSTEREO AIRCHECK managed and administered by COLONY through subscription. See table below.

<i>Month</i>	<i>South African</i>	<i>International</i>	<i>Percentage SA</i>
July 2018	2547	5496	32
Aug 2018	3042	6202	33
Sept 2018	2384	5662	29
Oct 2018 (16days)	1721	4065	30

TASK OF THE COMPLAINTS AND COMPLIANCE COMMITTEE

[3] For purposes of this matter, the nature and task of the Complaints and Compliance Committee needs to be re-stated. The Constitutional Court has held that the CCC is an independent administrative tribunal as understood in section 33 of the Constitution.² This means that it must be as independent as a Court and operate at a level where it may also advise the Council of ICASA to set aside administrative decisions, for example that of the SABC and the South African Post Office³ Of course, it may also advise other orders to the Council as set out in section 17E(2) of the ICASA Act in cases where a finding is made against a licensee.

[4] Section 17B of the Electronic Communications Act 2005 provides as follows:

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;

² The Constitutional Court, in *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) has held that the CCC is an administrative tribunal in terms of section 33 of the Constitution of the RSA and also that there is nothing in the ICASA Act which impinges upon its independence.

³ Which is also under the jurisdiction of the CCC by virtue of the SA Post Office Act.

The Constitutional Court⁴ has held that the investigative function of the CCC is constitutionally permissible, as long as it is not exercised *unfairly*. The CCC is thus not bound to the facts placed before it and could inquire, where necessary, as to e.g. the background of facts before it. The CCC has also held that before it investigates a matter, a *prima facie* case must be made out in the Complaint.⁵ Hearsay evidence is impermissible, except in the limited instances allowed by the Courts.⁶ The basic rule of *audi alteram partem*⁷ must consistently be applied. For any decision taken, sound reasons must be provided. The CCC is also not permitted in law to add to the charge sheet⁸ or advise that a new charge should be instituted. That is a matter for the General Manager Complaints and Compliance Affairs to decide.

APPLICATION OF ABOVE PRINCIPLES.

[5]The Complaint suffers from four intrinsic problems:

(a)First it relies on an ICASA Annual Compliance Report for the period 2015-2016. There must have been later reports. Secondly, although it is realised that the Report clearly emanates from a Division of ICASA, it is not permissible for the Complainant to simply, partly, base its complaint on it. It amounts to hearsay in so far as the Complainant is concerned and is, in any case, based on the year 2015-2016. It remains hearsay, even if, as in the present case, it has been confirmed by the Complainant as being a true copy. That, however, does not mean that it is free to be used by the Complainant without confirmation by the relevant Division of ICASA. In any case, more recent reports should also have

⁴*Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at para [48].

⁵ Compare *SAPO v Aramax & Others Case 130/2016*.

⁶ *Public Protector v Mail & Guardian Ltd and Others* 2011(4) SA 420(SCA) at para [14] Nugent JA explained: 'Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings. But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported statements, mainly in documents, have been placed before us. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.'

⁷ "Hearing the other side"

⁸ *Roux v Health Professions Council of SA & Another* [2012] 1 All South Africa Law Reports 49 (SCA).

been included. For all we know, the later reports might have sketched a totally different picture.

(b) Second, in two instances, the Complainant requests the CCC to do its own inquiry (see paragraphs 9 and 12 of the Complaint as numbered by the CCC for ease of reference). A Complainant must, *itself*, make out a *prima facie* case of a contravention. This appears clearly from the above quoted judgment in *SAPO v ARAMAX & Others*.⁹

(c) Third the Complainant refers to its own check on the Respondent, which lasted for 36 hours on what is called a “day part” basis. Although the notes of whoever did the check are attached to the Complaint, this hardly amounts to reliable monitoring on which the CCC can depend. In any case, the monitoring is not supported by an affidavit from whoever did the monitoring and thus amounts to hearsay – even if confirmed to be a true copy by the Director who signed the affidavit, which related to the Complaint as a whole. For the Director it remains hearsay if he did not undertake the monitoring himself

(d) Fourth, any additional complaints made during the hearing were based on the complaint as set out above and was not and could not, in law, be given validity by way of argument or even by evidence by anyone else than the person who did the monitoring.

FINDING

The Complaint is, accordingly, dismissed on the basis that it was based on hearsay and, furthermore, required from the CCC, in two instances, to do its own inquiry – which would, according to the guidance of the Constitutional Court, make the inquiry unfair in terms of administrative Law.¹⁰

The Complaint against GAUTENG MEDIA DEVELOPMENT PROJECT NPC t/a HOT 91.9 FM is, accordingly dismissed.



JCW van Rooyen

5 May 2019

The Members agreed

⁹ See footnote 5 above.

¹⁰ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) at para [48].