COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of Hearing: 3 April 2019 Case Number: 318 /2019

COMPLAINTS AND COMPLIANCE AFFAIRS ICASA

and

MASWANGANYI **COMPLAINANT**

V

GIYANI COMMUNITY RADIO **RESPONDENT**

COMMITTEE 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

Complainant: Mr Thembani Gift Maswanganye

From Complaints and Compliance Affairs ICASA : Mr Gumani Malebusha and Ms Siphiwe Magengenene; For the Respondent: Messrs Gezani Prenomen Chauke, Khazamula James Tlhabane, Sam Mfaladi.Coordinator of the CCC: Ms Lindisa Mabulu

---

JUDGMENT

JCW VAN ROOYEN SC

[1] The first aspect of this matter was referred to the Complaints and Compliance Committee by Complaints and Compliance Affairs ICASA, which has a monitoring

[1] An Independent Administrative Tribunal at the Independent Communications Authority of South Africa (ICASA) in terms of Act 13 of 2000 and section 192 of the Constitution of the RSA. It, inter alia, decides disputes referred to it by the Authority or filed with it in terms of the Electronic Communications Act 2005. Such a decision is, on application, subject to review by a Court of Law. The Tribunal also decides on complaints from within ICASA and outside ICASA 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. Such a decision is, on application, subject to review by a Court of Law. Where a complaint is not upheld by the CCC , the finding is also referred to Council.

function in regard to licensees. This aspect concerns the contravention of section 53(1) of the Electronic Communications Act 2005, as amended. Section 53 of the said Act provides as follows:

53 Record of programmes broadcast by broadcasting service licensees

(1) A broadcasting service licensee must -

(a) on demand by the Authority, produce to the Authority any recording of every programme broadcast in the course of his or her broadcasting service for examination or reproduction, within 60 days from the date of broadcast;

(b) on demand of the Complaints and Compliance Committee, produce to the Complaints and Compliance Committee any script or transcript of a programme after the broadcast of the programme.

(2) Nothing in this Act may be construed as requiring or authorising the Authority or the Complaints and Compliance Committee, in the performance of its functions, to view programmes prior to their being broadcast.

[2] On receipt of the present complaint against a broadcast by the Respondent radio station ("Giyani") a copy of the relevant recording was sought from Giyani. Giyani had allegedly, inter alia, defamed the Complainant in this matter. Giyani's answer was firstly that a "recording" did not exist since its recording system, unbeknown to management, had not been functioning during the broadcast. It was further argued that a "recording" would not necessarily mean an electronic copy of a broadcast, but would also include an alternative record of a broadcast – in this case, a copy of the document from which the newsreader read the news. This is not, however, what section 53(1)(a) of the ECA intends. A "recording" means that which was recorded electronically. It does not include the typescript from which the News is read. The intention is obviously that that which is broadcast would be copied electronically for the record of ICASA. Such record is, of course, most important for purposes of complaints against the radio station, not only insofar as content is concerned, but also as evidence of its duty to broadcast in terms of its licence. ICASA has a monitoring Division and such monitoring may, of course, be live, or after the broadcast. In times of Elections these recordings are most important so as to ensure that broadcasters comply with the relevant legislation. Obviously, the recordings are also important as a source on which a broadcaster may rely when it has allegedly contravened the relevant legislation. The Broadcasting Code, which was published as Regulations by ICASA in 2009, sets the rules subject to which broadcasters are judged by the CCC when a complaint is received against a broadcaster as to the *content* of a

broadcast. The same Code, which is also applied by the Broadcasting Complaints Commission of South Africa, was also approved by ICASA, after having been presented to Council by the National Association of Broadcasters, which set up the said independent broadcasting complaints mechanism, which hears complaints against broadcasters which, via the said Association, fall under its jurisdiction. ICASA (then called the Independent Broadcasting Authority) recognised the BCCSA in 1995 as an independent body that would deal with complaints against broadcasts by members of the National Association of Broadcasters. Both bodies may only consider a complaint *after* a broadcast. That there would be no censorship of broadcasts in South Africa, was already clearly stated in the IBA Act 1994 and repeated in section 53(2) of the ECA. This approach also conforms with the guarantee of freedom of expression in section 16 of the Constitution of the RSA. *Giyani* is not a member of the National Association of Broadcasters and, thus, falls under the jurisdiction of the CCC insofar as content of broadcasts is concerned. All broadcasters, however, fall under section 53(1) of the ECA and under the jurisdiction of the CCC, if a contravention of the said section is alleged by Complaints and Compliance Affairs (ICASA). There are also other Regulations which apply to all broadcasters and are applied by the CCC, to the exclusion of the BCCSA.

[3] The duty to record broadcasts applies to all broadcasters. The argument by Giyani Community Radio that the typescript from which its newsreaders read the News also qualifies as a recording, is unacceptable. A recording in modern parlance is an electronic recording which must on a continuous basis record what is broadcast. The CCC has had an instance where impossibility for a day was accepted as a defence, while part of a radio station was being moved. However, the clear legal expectation is that a broadcaster *must* ensure that the recording takes place continuously and that a back-up mechanism should be in place. With the availability of modern equipment, such as mobile phones, there should hardly be an instance when a recording cannot be made, even during hours where electricity is not available or the equipment is not functioning.

[4] It was argued that the management of the Respondent was unaware of the fact that the mechanism was not working and had it repaired as soon as it became aware of its failure. The crucial broadcasts which pertained to the Complainant were not recorded. The script from which the News was alleged to have been read was, however, available. Nevertheless, the Respondent is found to be in contravention of section 53(1)(a) of the ECA and at the end of the judgment we shall deal with an appropriate order which will be advised to the Council of ICASA. We will accept in favour of the Respondent that the omission

was not intentional. However, negligence will also suffice for a finding against the Respondent. The test is that of the reasonable broadcaster. A reasonable broadcaster should take steps to ensure that it is not left without recording equipment and daily check whether the recording mechanism is in a working order. It is clear from the evidence before the CCC that the Respondent did not regularly check whether the equipment was in working order. There was no evidence as to how long this equipment had not been in a working order and the CCC is of the opinion that the Respondent was grossly negligent in the omission to ensure that the copying mechanism was constantly in a working order.
A finding is, accordingly, made against Giyani for having been grossly negligent in its omission to record the relevant broadcasts.

SECOND COMPLAINT

[5] The Complaint by Mr Maswanganye has a bearing on a news broadcast on the 1st November 2018 – apparently more than once between 07:00 and 13:00.Other dates were also mentioned. The essence of the complaint is as follows:
(1) Firstly it is stated that the news item was unfairly misleading and falsely reporting news in a manner that does not give true details of the real story.
(2) The news coverage was the Court appearance of the Complainant and a second and third person whose names need not be mentioned, since they are not Complainants.
(3) The news readers, according to the Complainant, were broadcasting hate speech against him and false information in regard to the Court procedure and his financial position. The "habit" has been in practice since 18 May 2018, 25 July, 26 August, 25 September, 26 October and 1 November 2018, according to the Complainant. The news reader(s) were saying that a SAPS Case (in which the Radio Station is the complainant against the Complainant in this matter) was squashed by the SA Police Services of Giyani against the accused, whilst the truth was that a case was previously struck off the Court Roll due to lack of evidence.
(4) Another news item read on air was that the Complainant had not paid his lawyer, which is, according to the Complainant, untrue because the Court appearance on the 26th August was heard and the matter was postponed until the 25th September. In any case, the Complainant avers that he had paid his legal representative and given him full instructions to conduct a trial, since the time of his appointment as his lawyer.
(5) The Station is publicly broadcasting propaganda and misleading listeners and as a result promoting hatred, hate speech against the Complainant, the Justice System and the other accused persons.

(6) The following is then pleaded for by the Complainant:

(a) A right of Reply with a proportional time equivalent to that used to defame the character of the Complainant;

(b) An unreserved apology in the news bulletin, current affairs programmes, GCR Talk and TA Magunga;

(c) The broadcast tapes must also be made available to the Complainant and his lawyers.

And if this is not done, the Complainant will take the matter to his lawyers and institute Court proceedings to revoke the licence and a claim for damages in the High Court.[2] The CCC will only deal with (b) above, since a right to reply is not justified in the present matter and the tapes are, in any case, not available.

[6] The CCC was informed at the hearing that although the news item was not recorded, the following is a copy of the document from which the news was read in Tsonga, one of the official languages of the Republic of South Africa:

Nandzu ehenhla ka Thembani Gift Maswanganyi loyi a tivekaka hi vito ra Thembhani Chavani wu ya emahlweni eka siku ra namuntlha.

Ku tengiwa ka nandzu swi ya emahlweni eGiyani Magistrate Court namuntlha, laha mbhoni ya vumbirhi yi nga ta va yi nyika vumbhoni endzhaku ka loko yo sungula yi nyikile vumbhoni eka n'hweti ya tolo.

Ku tengiwa a swisiveriwanga hi nchumu hambi leswi muyimeri wa swa nawu wa Chavani anga tshika kunwi yimela hi kwalaho kova xikhwama xa Chavani xi boxekile hi tlhelo ra macheleni.

Chavani u hehliwa hiku onha nhundzu ya xitinci xa vaaki xa Giyani Community Radio kumbe GCR GM hi ku komisa Nwaxemu.

Nandzu lowu a wu ncakunyiwile emaphoriseni ya Giyani hambi leswi a kuri na vumbhoni byo khomeka. Xitinci xi ye emahlweni naku tlhotlha leswaku nandzu wuya emahlweni ku kondza wu tlhela wu sungula na kambe.

Ku sukela nandzu awu tshamela ro hundziseriwa emahlweni tani hi leswi Chavani ava na mitlhotlho hi tlhelo raku va yimeri va nawu vakwe.

Ku tengiwa ka nandzu lowu swipfuleriwile eka muaki wunwana na wunwani na swona swita sungula hi awara ya mbirhi hlikani wa namuntlha.

[7] The broadcast was translated, as follows, into English by the radio station:

The Court case against Themba Gift Maswanganyi, also known as Thembani Chavani, continues at the Giyani Magistrate Court today.

The second witness will take the stand after the first witness finished his testimony last month.

[2] This is, of course not correct. ICASA would have to be approached via the Complaints and Compliance Committee to seek an order that the license be revoked. Thereafter the Council of ICASA would take the final decision – that is, if withdrawal is advised to Council by the CCC.

This case was not disturbed even when the lawyer of the accused excused himself on this case due to financial problem with Thembani.
The accused Chabani is facing the allegations of malicious damage to property of Giyani Community Radio known as GCR FM last year.
This case was withdrawn by Giyani Police station even where there was strong criminating evidence by witnesses.
The Station continued to force the matter to be heard in the Court until the case was reinstated.
At first, this case was always postponed because the accused Chabani was in dying (read dire) state of financial problems with his attorneys.
The hearing of this Court case is open to everyone and it will start at 14:00

[8] The Complainant stated during the hearing before the CCC that he did not accept the wording of the news as handed in by Giyani. He was called *Nsulavoya* in the newscast(s) which, in Tsonga, means robber, outlaw or wanted criminal. At the hearing this was denied by the Radio Station representatives as being the correct translation and, in any case, Giyani denied that this word had been used.

THE BROADCASTING CODE

[9] The ICASA Broadcasting Regulations 2009 provides as follows in Regulation 11, of which the first four paragraphs are quoted hereunder – since the rest of Regulation 11 is not applicable to the present matter:

11. News

(1) Broadcasting service Licensees must report news truthfully, accurately and fairly.

(2) News must be presented in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by:

(a) Distortion, exaggeration or misrepresentation.

(b) Material omissions; or

(c) Summarisation

(3) Only that which may reasonably be true, having reasonable regard to the source of the news, may be presented as fact, and such fact must be broadcast fairly with reasonable regard to context and importance.

(4) Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it must be presented in such manner as to indicate, clearly that such is the case.

[10] As appears from the above subsections of the Broadcasting Code, hate speech is not included in this part of the Code. Even if the hate speech clause had been included, the broadcast did not reach the level of hate speech, which is defined by the Code in accordance with section 16 of the Constitution of the RSA. The Code indeed repeats the wording of section 16(2)(c) of the Constitution of the RSA: advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[3] What is, inter alia, absent in the newscast is "advocacy." Advocacy requires much more than a mere statement. Even if the statement is not true, that is not strong enough to reach the level of advocacy – as clearly appears from two judgments of the Constitutional Court quoted above. The judgments of the Broadcasting Complaints Commission would also not support a finding of hate speech.[4] Although the CCC is not bound by the BCCSA judgments, they are, at least, valuable in determining what has been decided within the sphere of broadcasting as from 1993, when the BCCSA was set up by the National Association of Broadcasters as an independent Tribunal. The BCCSA adopted the 2009 Code of ICASA – although the numbers of the sections of the two Codes differ.

[11] Insofar as reference in the newscast is made to the Court case in which the Complainant is involved, there is insufficient evidence before the CCC as to the detail of the proceedings in the matter so as to come to a reasoned decision. The same conclusion was reached as to the financial arrangement with the Complainant's attorney. No decision is, accordingly, reached insofar as these aspects of the complaint are concerned. That does not mean that the news was necessarily correct, but simply that insufficient evidence was placed before the CCC to place it in a position to come to a reasoned decision. These complaints are accordingly dismissed.

[12] What clearly lies at the core of the Complaint is the allegation that Complainant was referred to as a criminal before the Court had come to a decision on his guilt. In this connection we accept the evidence of the

[3] Compare the following judgments of the Constitutional Court: SARS v CCMA 2017 (1) SA 549 (CC); Duncanmec (Pty) Ltd v Gaylard NO and Others 2018 (6) SA 335 (CC).
[4] *Human Rights Commission of South Africa v South African Broadcasting Corporation* 2003(1) Butterworths Constitutional Law Reports 92(BCCSA).

Complainant that he was referred to as a criminal - *Nsulavoya* – in Tsonga, in which the news was read. Although the Deputy Chair of the Board of Giyani adamantly stated at the end of the hearing that the word was not understood in that sense in Giyani, the Dictionary[5] research shows that it is indeed the meaning of the word in the sense of a *robber* and that it also means *rogue*. It was also understood in that sense by the Complainant. In the absence of the electronic record of the broadcast(s), it is accepted that the Complainant was correct in his evidence. No involved news reader was called as witness to deny that the word had been used. And, of course, there is no electronic reproduction of the news which could show that the word was not used. The reasonable listener – which is the test applied by the Constitutional Court – would have understood the word as meaning *robber*: that the Complainant is indeed a *criminal*.[6] Even if it were to have been understood as *rogue,* the word remains defamatory – a rogue is *inter alia*, defined as being a person who is dishonest or unprincipled.[7]

[13] Although not raised by the Respondent – which was not represented by legal counsel – it would be fair to consider whether the defence of fair comment is not possibly applicable. It is indeed so that our Courts have dealt with this defence where a person was referred to as a "criminal" or having been involved in such behaviour. Thus, one finds the following quote of Lord Justice Fletcher (England) by Chief Justice Innes (South Africa) in *Roos v Stent and Pretoria Printing Works Ltd* 1909 TS 988 at 999[8] (quoted with approval by Justice Zondo and two concurring Colleagues in the Constitutional Court):

"The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment, in order to be justifiable as fair comment must appear as comment, and must not be so mixed up with facts that the reader cannot distinguish between what is report and what is comment. . . . The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent be negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled, so that it is not

[5] EJM Baumbach *Analytical Tsonga-English* (July 2008). A copy of this Dictionary can, *inter alia*, be found in the Merensky Library at the University of Pretoria (N 496.327S530321). The Zulu is, according to the Dictionary, *inswelaboya.*

[6] Compare *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) – the majority judgment.

[7] *Shorter Oxford English Dictionary*.

[8] Quoted with approval by Zondo J (Jafta J and Leeuw AJ concurring) in their judgment in *DA v ANC* 2015 (2) SA 232 (CC).

reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case, it merely points to the existence of extrinsic facts which the writer considers warrant the language which he uses.' [footnotes omitted.]

Justice Zondo's comment in the DA case (see note 8 above) was as follows:

Innes CJ said in *Roos* that in *Hunt v Star Newspaper Co* Lord Justice Fletcher Moulton was dealing with a case where 'the facts which were commented upon did appear in the publication but were so mixed up with the comments that it was impossible to say what were the facts and what was comment'. He said that Lord Justice Fletcher Moulton's words seemed to him to 'apply *a fortiori* to cases where the facts commented upon are not placed before the reader at all'.

Justice Zondo, quoted further from the judgment of Innes CJ:

'There must surely be a placing before the reader of the facts commented upon, before the plea of fair comment can operate at all. I do not wish to be misunderstood upon this point; I do not desire to say that in all cases the facts must be set out verbatim and in full; but in my opinion there must be some reference in the article which indicates clearly what facts are being commented upon. If there is no such reference, then the comment rests merely upon the writer's own authority.'

In *Roos* Judge Smith also referred with approval to the passage quoted by Chief Justice Innes from the judgment of Lord Justice Fletcher Moulton in *Hunt's* case. Judge Smith said:

'If the defence of fair comment cannot be sustained when the fact and comment are so intermingled as to be indistinguishable the one from the other, *a fortiori* it cannot be fair comment if none of the facts on which the expression of opinion is based appear.'

However, Judge Smith went on to say that he thought that there could be cases 'where the facts are so notorious that they may be incorporated by reference'.

Judge Smith then continued:

'But in the present [case] no reference was made to any sources from which the writer deduced the facts on which he based the assertion complained of. No opportunity was afforded to a reader of the article to know the grounds on which the imputation was based. I therefore think that the defence of fair comment should fail.' (Reference excluded)

In the light of these judgments there is, accordingly, no ground upon which the CCC could come to a different conclusion as to the reference to the Complainant as a robber or a rogue.

FINDING

[14] The CCC's finding on this Complaint is as follows:

(1) That the Giyani Radio Station had in at least one of its 2018 broadcasts referred to by the Complainant referred to the Complainant as a robber in Tsonga and that such a reference was not supported by the facts;

(2) That even if some listeners understood the word as a "rogue" it was also not supported by the facts and, in any case, a substantial number of reasonable listeners were likely to have understood it as "robber."

(3) That the charge of hate speech is not upheld since the broadcast did not rise to the level of hate speech as defined in section 16 of the Constitution of the RSA and the ICASA Broadcasting Regulations 2009.

(4) That the other complaints raised in the Complaint were not sufficiently elaborated upon in the evidence before the CCC and are thus not upheld.

ADVICE TO COUNCIL OF ICASA

[1] Both findings against Giyani Community Radio are serious contraventions. ICASA, in its monitoring function in terms of the ICASA Act, is seriously prejudiced in the said function if a radio station does not record its broadcasts. It is true that the evidence does not justify an intentional contravention of section 53(1)(a) of the Electronic Communications Act. Nevertheless, the finding of gross negligence also amounts to a serious contravention. It, indeed, calls for a fine. Since this is Giyani's first contravention, part of the fine is advised to be suspended. We have studied the latest Financial Statement of the Respondent and we are satisfied that a fine of R20 000, with R10 000 suspended for three years, would serve to caution the broadcaster and other broadcasters against approaching the duty to record in terms of section 53(1)(a) of the ECA in a careless manner.

[2] Insofar as the Complaint by Mr Maswanganyi is concerned, Giyani Community Radio Station be ordered to broadcast, as a *first* item of its *News* after 07:00 (thus before 08:00) the first Monday, Tuesday, Wednesday, Thursday and Friday, after release of this judgment and order by ICASA, the following in English and Tsonga directly after each other.

“Xitici xavu haxi xa Giyani Community Radio xilerisiwile hi nhlangano wo yimela swavu haxi kunga Independent Communications Authority of South Africa Ku humesa hungu ro kombela ndzivalelo eka Mr Thembani Maswanganyi endzaku ka loko xitici hi lembe ra 2018 xi tivisile leswaku Mr Thembani Maswanganyi i nsulavoya ehandle kaku voniwa nandzu hi Huvo ya vuavanyisi, Giyani Community Radio va kombela ku rivaleriwa kuva va endle xihoxo lexi.”

“Giyani Community Radio has been ordered by the Independent Communications Authority of South Africa to broadcast the following apology to Mr Thembani Maswanganyi: that the radio station stated in a broadcast or broadcasts in 2018 that he was a robber without a Court having found him guilty as a robber. Giyani Community Radio Station unconditionally apologizes to him for having made this error.”

ORDER ADVISED TO COUNCIL IN TERMS OF SECTION 17E(2) of the ICASA ACT 2000 As Amended:

1. **That in regard to the omission to record the news programme or programmes referred to in the Complaint: Giyani Community Radio Station is fined R20 000 of which R10 000 is suspended for three years from the issue of this order. The fine must be paid to ICASA before 1 August 2019.**
2. **That if Giyani Radio Station is again found by the Complaints and Compliance Committee, as confirmed by the Council of ICASA, to have contravened section 53(1)(a) of the Electronic Communications Act 2005 as amended, within three years from the date that this order is issued by ICASA, the suspended fine will be made operational by the Council of ICASA in addition to any further order that is advised to Council by the Complaints and Compliance Committee.**
3. **That Giyani Community Radio Station be ordered to broadcast, as a *first* item of its *first News* after 07:00 (but before 08:00) on the first Monday, Tuesday, Wednesday, Thursday and Friday after the issue of this order, the following in Tsonga and English *directly* after each other.**

"Xitici xavu haxi xa Giyani Community Radio xilerisiwile hi nhlangano wo yimela swavu haxi kunga Independent Communications Authority of South Africa Ku humesa hungu ro kombela ndzivalelo eka Mr Thembani Maswanganyi endzaku ka loko xitici hi lembe ra 2018 xi tivisile leswaku Mr Thembani Maswanganyi i nsulavoya ehandle kaku voniwa nandzu hi Huvo ya vuavanyisi, Giyani Community Radio va kombela ku rivaleriwa kuva va endle xihoxo lexi."

"Giyani Community Radio has been ordered by the Independent Communications Authority of South Africa to broadcast the following apology to Mr Thembani Maswanganyi: that the radio station stated in a broadcast or broadcasts in 2018 that he was a robber without a Court having found him guilty as a robber. Giyani Community Radio Station unconditionally apologizes to him for having made this error."

4. **That an electronic copy of the five broadcasts ordered be copied to ICASA within seven working days after the said five broadcasts accompanied by an *affidavit* of the Station Manager that the apology was broadcast – including the time and dates thereof.**

J. C. W. van Rooyen

JCW VAN ROOYEN SC **18 May 2019**

The Members of the CCC agreed