

COMPLAINTS AND COMPLIANCE COMMITTEE¹

Date of Hearing: 7 December 2018

Case Number: 289/2018

MOKOPANE CONCERNED RESIDENTS

COMPLAINANT

V

MOKOPANE 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

For the Complainants: H Kopole and S Dipela

For the Respondent: J Mohoto, P Ngoben, P Moremi and M Mashiloane

From the Coordinator's Office: Ms X Mantshintshi

Coordinator: Ms Lindisa Mabulu

JUDGMENT

PROF JCW VAN ROOYEN SC

INTRODUCTION

[1] Mokopane Community Radio is a broadcaster which is licensed by the Independent Communications Authority of South Africa ("ICASA"). It provides, according to its licence, radio services for the town of Mokopane and

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 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.

surrounding villages in the Limpopo Province of the Republic of South Africa.

[2] The Mokopane Concerned Residents, which is a society² within the broadcasting range of the radio station, lodged a complaint with the Complaints and Compliance Committee at ICASA.

COMPLAINT

[3] The Deputy Secretary of the Complainant set out the complaint in broad terms and did not specify the relevant licence conditions, the radio station's Constitution and the ICASA Regulations on Standard Terms and Conditions as amended in 2016.

[4] The information provided by the Complainant was, however, sufficient for the Coordinator's Office to set out the relevant alleged contraventions. The following complaint was, accordingly, sent to the Respondent, granting it 15 days to respond to the Complaint. The alleged contraventions were stated as follows:

1. Clause 4.2.3.2 of the licence conditions read with clause 35(iv) of the Respondent's Constitution provides that "the presentation of audited financial statements, operational and financial performance shall be dealt with at the AGM". The alleged contravention is that the Respondent failed to present the audited financial statements at the AGM held on the 24th March 2018.

2. Clause 35(iii) of the Respondent's Constitution provides that "thirty days written notice shall be given prior to the AGM. It is the responsibility of the Board to ensure that all members, communities and stakeholders are informed of the AGM inclusive of the agenda, date, time and venue." The alleged contravention is that the Respondent only announced the AGM on radio on 20 April 2018, being the day before the AGM and thereby failed to give a 30 days written notice to all the members prior to the AGM.

3. Clause 35(v) of the Respondent's Constitution provides that "the AGM shall only be held at a local venue or place that is accessible to members and or community." The alleged contravention is that on 24 February 2018 a Special General Meeting was held at Ga-Madiba which is an inaccessible and non-central venue and most community members were disadvantaged by the location and could not attend the meeting.

² Which was not disputed by the Respondent radio station in its Response. Later on in its final affidavit, the radio station's Chair alleges that the Complainant, in her view, only represents a few people. We will, however, as during the hearing, accept that the Complainant indeed exists.

4. Clause 43 of the MCR's Constitution provides that "only registered members of the station shall be eligible to amend the Constitution and that fourteen days' notice shall be given for such amendments including the proposed changes." The alleged contravention is that the Respondent failed to give 14 days' notice and that the Constitution was only amended by two members of the Interim Steering Committee, without involving other members and the registered community members.

5. Schedule 1, Clause 10A 7(b) of the Regulations on Standard Terms and Conditions, as amended in 2016, provides that "a licensee must encourage the community within its coverage area to participate in ownership, management of television and radio station." The alleged contravention is that at the AGM, members of the community claimed to be intimidated when they raised issues of concern about certain things, procedures and they were cautioned about the presence of the Police and security guards who had clear instructions.

RESPONSE BY MOKOPANE RADIO

[5] Mokopane Radio responded as follows:³

1. The AGM that was held on 24 March 2018 collapsed as a result of some disgruntled community members insisting to participate at the AGM as non-members of the Community Radio Station.
2. Due to the confusion and misunderstanding caused by the disgruntled community members, the Independent Steering Committee highlighted same to the Senior Compliance Manager (from ICASA), Mr Amos Hlabioa. It was suggested that the disgruntled members must be afforded an opportunity to register their membership within the stipulated period to enable them to participate in the Station's Affairs. However, the final decision would lie with the AGM.
3. The community members resolved that:
 - (a) The AGM be disbanded;
 - (b) Registration of membership be re-opened with immediate effect and the membership applications be closed on the 13th April 2018;and
 - (c) The next date for the AGM would be on the 21st April 2018.
4. As a result of the above-mentioned, the Audited Financial Statement could not be presented, as the AGM was disbanded.

³ Numbering amended for ease of reference.

5. The next date for the AGM, 21 April 2018, was announced on the 26th March 2018 when the AGM was disbanded. The promo started to run on the 26th March 2018 until the 20th April 2018. Proof of this was provided to the CCC after the hearing.
6. The venue (Ga-Madiba) where the Special General Meeting was held falls within the licence area of Mokopane Community Radio. The distance from the station to Ga Madiba is 8,2 km and is easily accessible. However, the distance from the Station to Makgoboketja Primary School in Tshamahansi (i.e. venue for the AGM dated 21 April 2018) is 13,9 km. There is a difference of 5,7 km between Ga-Madiba and Tshamahansi and both places are accessible.
7. Community members also complained at the failed AGM, that was held on 25 November 2017 at Kgatelopele Primary School, about the AGM that is always held within the vicinity of Mahwelereng to the exclusion of others falling within the coverage area.
8. After the failed AGM held on the 27th January 2018, the Interim Steering Committee sought remedial action from ICASA. ICASA's response dated 7 February 2018 advised the Interim Steering Committee to conduct a SGM on or before 25 February 2018 and make arrangements for same. The Interim Steering Committee held an urgent meeting on the 9th February 2018 and made arrangements to address this matter.
9. From the onset members were included in the Interim Steering Committee in the discussion of the amendments of the Constitution. Firstly Mr Matsoma, an Interim Steering Committee member, volunteered to draft the amended Constitution. Interim Steering Committee members gave their inputs via Mokopane FM WhatsApp Group. An announcement was also made on radio inviting community members to give their inputs regarding amendments to the Constitution. Such inputs were to be made via visit to the station and a Current Affairs Show. Ms Pat Ngobeni (who prepared this response) became engaged in compiling the final draft of the amended Constitution.
10. Clause 43 of the MCR's Constitution was not applicable when the SGM was held on the 24th February 2018. The purpose of the (said) SGM was to urgently discuss the amendment of the Mokopane FM Constitution and the registration of membership since Mokopane FM is registered as an

NPO. The said amendments to the Constitution and registration of membership was discussed by the community members. The amendments to the Constitution were adopted on the said date.

11. Based on the above, clause 43 of the MCR's Constitution became applicable on the 24th February 2018 after it had been adopted by the community members. Applying the clause before the amendments were adopted will render it null and void. The drafted amended Constitution was attached and emailed by Mr Mmashela Matsoma to Mr Thabo Mohlatlole. The same email was later forwarded to the undersigned by Mr Thabo Mohlatlole.
12. We have no knowledge of the issue of intimidation since same was never reported at the AGM. Attached was a video which would confirm this.
13. Nominees whose names were called last were nominated. See Nomination forms attached to the Response. Further a letter from the declined nominee confirming the success of the AGM.
14. The members agreed that station officials form part of the counting. Reference is made to the attached video.
15. The issue of ballot papers was deliberated on at the AGM. Clause 37 of the MCR's Constitution stipulates that voting shall be conducted in the form of a private ballot paper. However, the AGM rules further stipulated that in the absence of ballot papers, voting shall be by way of hands.
16. The election results is in possession of ICASA. The allegation of vote rigging is unfounded. The members agreed that four independent observers from the Tribal Authority, inclusive of Station Officials, form part of the counting of election results.
17. The assets of the Station inclusive of the radio equipment were attached as a result of mismanagement by the previous Board. ICASA is already in possession of the Audited Financial Report. The Station currently lacks resources and the studio equipment currently used is incomplete and not in a good condition. The studio equipment in use was donated by a concerned station official to avoid the Station going off air. See attached inventory, newspaper clip and an email from ICASA confirming knowledge that the Station's assets were attached as marked in Annexures. See further picture confirming the current state of the studio equipment marked as Annexure MFM 23 respectively.

The above Response was signed by the Chairperson of the Board, Ms Pat Ngobeni.

REPLY BY COMPLAINANT

[6] In summary the Reply from the Complainant was as follows:

1. It does not accept the response that the Financial Statement was not dealt with at the first meeting, since the meeting was disbanded and a new date for the AGM was set. The Financial Statement was not on the Agenda and if it had been the intention to deal with it at the meeting, it would at least have been on the Agenda. In any case, the Chair of the Interim Steering Committee, indicated to the meeting, when the meeting was abandoned, that the audited financial statements had “discrepancies.” This, according to the Complainant, indicated an ulterior motive behind the non-disclosure. It is noted that the Respondent is silent on the Financial Statements.
2. It is not accepted that the notice of the AGM commenced on the 26th March until the 20th April.
3. As to the venue of the AGM (Tshamahansi) the Complainant still argues that it was not disputed that the venue of the AGM falls within the broadcast area of the Respondent, but the choice was still in conflict with the ICASA rule that requires the venue to be easily accessible and does not cause any inconvenience.
4. There was, despite attempts to the contrary, not the required involvement of the community in the drafting of the Constitution. The required 14 days’ notice of amendments was also not given. Only two members of the interim steering committee had (prepared the amendments) to the Constitution and there had, accordingly, not been involvement of other community members.
5. The Respondent Station had not complied with the Standard Terms and Regulations in so far as it had not encouraged the community within its coverage area to participate in ownership, management of the radio station. It is further alleged that members of the community claimed to have been intimidated when they raised issues of concern about certain things (procedures) and that they were cautioned about the presence of

the Police and Security Guards who had clear instructions

DIRECTIVE FOR CONFIRMING AFFIDAVITS

[7] At the close of the meeting the Chairperson, with the support of the Members of the CCC, directed the Chair of the Board to file an affidavit as to what was claimed by the Respondent in its answer and what was added during the hearing in defence of the Radio Station. Such an affidavit was received and the Complainant was permitted to file a Response by way of an affidavit. The Chair of the Board was permitted to Reply in a replying affidavit.

[8] The Chairperson of the Board confirmed in her affidavits that the steps taken in regard to the new Constitution were not questioned at the AGM and that sufficient consultation had taken place beforehand. The Complainant, however, questioned the *bona fides* of the procedural steps taken at the meeting insofar as the election of Board members was concerned. Why was the result of the voting not announced and why did staff members assist in the counting of the votes? This pointed towards meddling with the votes.

FINDING BY THE CCC

[9] As background to this matter it is of importance that the strategy which was followed by the Interim Steering Committee was guided by the presence and advice of ICASA's Senior Manager Compliance. At least, the opportunity for the community members to formally become members of the Station (which would allow them to vote at the AGM, which was set for a later date) was undertaken on the advice of the said officer of ICASA and the concept of setting up a second meeting was similarly undertaken. ICASA is under an obligation to monitor broadcasting licensees as to their compliance with the relevant Regulations and their licence conditions. Although finally binding decisions cannot be made by the relevant division of ICASA insofar as contraventions are concerned – that is the task of the CCC and Council of ICASA – weight by licensees would understandably be attached to advice of the relevant Division. In fact, the arrangements which were made, under advice, amounted to a practical solution. The first AGM had to be disbanded so as to grant members of the community an opportunity to formally become members of the radio station and thereby, inter alia, obtain the right to vote. This was in line with the proposed new Constitution of the radio station.

[10] Although the ideal would consistently be that the legislation and licence conditions must be complied with to the letter,⁴ Acting Chief Justice Moseneke stated as follows in *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at para. [21]:

“While our law recognises that *substantial compliance* with statutory requirements may be sufficient in certain circumstances, Mr and Mrs Ferris have not given compelling reasons why a substantial-compliance standard would be useful or appropriate in determining compliance with a debt-restructuring order. On the contrary, there is no indication in the wording of the Act or the debt-restructuring order that anything less than actual compliance is required. Further, it was raised for the first time at the hearing before this court, and this court has held that it should be wary of deciding issues raised for the first time on appeal. Finally, even if substantial compliance were appropriate in this case, I am not convinced that Mr and Mrs Ferris had substantially complied by the time summons was issued — at that stage they had only paid R1000 of the almost R9000 owing under the order.” (accent added)

[11] In the present matter the CCC could find no error or a substantial error in the following:

1. The postponement of the AGM so that members of the community, who had not previously joined as members of the Radio Station, could join as members and vote at the AGM.

2. The places where the meetings were held. Given the size of the area which is reached by the radio station, there would always be members who could complain about the place where the meeting was held. Insufficient reasons were given for the complaint that the AGM was held at a place which is not reasonably accessible. The test is not accessibility, but reasonable accessibility. The CCC is not convinced that the AGM was not held at a reasonably accessible place.

3. The allegation that there was intimidation by the Police or Security Guards at the AGM is not substantiated by facts set out by the Complainant. A mere suspicion would not suffice.

4. There is no reason to interfere with the choice of persons to count the votes at the AGM. There is no evidence before the CCC which would substantiate a reasonable inference of fraud. In any case, the staff involved in the counting of the votes were accompanied by respected members of the community.

5. In so far as the election of Board members is concerned, the Constitution provides that the elected members amount to eight and that the

⁴Guidance, in this respect, is provided by Navsa JA 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).

Board then appoints two members based on expertise. The number of *members* who attended the AGM was 230. In accordance with common practice a person who obtains more than half of that number, is regarded as elected. Eight nominees drew such a number. It was, accordingly, not necessary to consider the nominees that obtained less than 115.

6. Insofar as the content of the new Constitution is concerned, the CCC is satisfied that sufficient measures were taken to consult by the members of the Committee who were involved in the amendments. *Whatsapp* consultation was, inter alia, used to engage the members of the Committee.⁵ The new Constitution was also applied at the AGM and there is no record of complaints at the AGM against the new Constitution. That resolutions may be taken by implication – e.g. by conduct - is a well-known principle of our law. Of course, it must be clear that such resolution was taken by implication and that there is not a law which requires that a prescribed procedure be followed.⁶ It was well known that the previous AGM had been disbanded so as to grant an opportunity for members of the community to become members of the radio station and take part in the AGM, where the election of the Board was on the Agenda. It would also be reasonable to accept that members present at the AGM, where the Board was elected, knew that only registered members could vote. The CCC is also satisfied that proper and timeous notice was given of the date and place of the AGM, where the Board was elected.⁷ The election of the Board was the main issue. The complaint of the Complainant is also that the outcome of the election was not made known at the meeting. From this, the Complainant argues, it should be inferred that there had been meddling with the votes. The Complainant argues that the CCC must infer this from the omission to make the outcome known at the meeting. However, this is not the only reasonable inference which may be drawn from the omission to declare the outcome of the vote. Given the history of the meetings before the AGM, it could have been based on security reasons. There are no reasonable grounds for the CCC to intervene in the election of the Board.

7. It is true that the Financial Statement was not placed before the Meeting for approval. But that could not affect the validity of the meeting or the election. ICASA has, according to the Respondent, been copied with the audited

⁵ See Annexures to the Radio Station's Response to the Complaint – MFM 7-16A.

⁶ [9] Watermeyer ACJ in *Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241, discussing the question of acceptance by conduct, made the following observation: 'Now a binding contract is as a rule constituted by the acceptance of E an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn.'"

⁷ Confirmed by the Respondent after the hearing to the satisfaction of the CCC.

financial Statement. However, the Constitution of the Respondent requires that it be approved by the AGM. This was not done and amounts to an omission which must, in the circumstances in which the Respondent has found itself, be regarded as a contravention. It would, however, be impractical to expect the Respondent to now call a Special Meeting for this purpose. However, an appropriate order in this connection will be advised to the Council of ICASA.

The outcome of this matter is, accordingly, that except insofar as the financial statement is concerned, the Respondent is found to have not contravened as charged before the CCC

ADVICE TO COUNCIL AS TO AN ORDER IN TERMS OF SECTION 17E(2) OF THE ICASA ACT

1. THAT MOKOPANE RADIO STATION BE ORDERED TO FILE, WITHIN 30 WORKING DAYS AFTER THIS ORDER IS ISSUED, WITH THE COUNCIL OF ICASA, AN AUDITED COPY OF THE ANNUAL FINANCIAL STATEMENT, WHICH SHOULD HAVE BEEN FILED FOR APPROVAL AT THE 2018 ANNUAL GENERAL MEETING.

2. THAT MOKOPANE RADIO STATION FILE THE SAID FINANCIAL STATEMENT AT ITS 2019 ANNUAL GENERAL MEETING FOR APPROVAL AND SEND PROOF THEREOF TO ICASA WITHIN 10 WORKING DAYS.

3. THAT MOKOPANE RADIO STATION BE FINED R20000 (TWENTY THOUSAND RAND) FOR THE ABOVE CONTRAVENTION IN 2018. HOWEVER, THAT THE FINE IS SUSPENDED UNTIL 31 DECEMBER 2022, SUBJECT TO THE CONDITION THAT MOKOPANE RADIO STATION IS NOT FOUND BY THE COMPLAINTS AND COMPLIANCE COMMITTEE TO HAVE BEEN IN OMISSION TO HAVE ITS FINANCIAL STATEMENT APPROVED BY ITS AGM.



JCW VAN ROOYEN SC
CHAIRPERSON OF THE CCC

24 February 2019

The members were in agreement with the above judgment.

